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The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role

Rory K. Little

Hastings College of the Law, University of California

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The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role

Cover Page Footnote

Associate Professor of Law, Hastings College of the Law, University of California, little@uchastings.edu. J.D., 1982, Yale; B.A., 1978, University of Virginia.

THE FEDERAL DEATH PENALTY: HISTORY AND SOME THOUGHTS ABOUT THE DEPARTMENT OF JUSTICE'S ROLE

Rory K. Little*

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* Associate Professor of Law, Hastings College of the Law, University of California, littler@uchastings.edu. J.D., 1982, Yale; B.A., 1978, University of Virginia. Thanks to Hastings Dean Mary Kay Kane and Academic Dean Leo Martinez for their support, including a semester's research sabbatical and a Summer Research stipend. Thanks also to Attorney General Janet Reno and former Deputy Attorney General Jamie S. Gorelick for allowing me to participate in the important work of the Capital Case Review Committee in 1996-97. Further thanks to Fordham University School of Law and Professor Bruce Green for the symposium invitation for which this Article was originally developed, and to Professor Jay Pottinger at Yale Law School who sponsored an early talk on the topic. I am very grateful for helpful comments from Vik Amar, Scott Bales, Ash Bhagwat, Richard Boswell, David Bruck, Stephen Clymer, Kevin DiGregory, Kirby Heller, Evan Lee, Rick Marcus, Calvin Massey, Robert McGlasson, David Reiser, David Runke, Reuel Schiller, Jonathan Schwartz, Louis Schwartz, William W Schwarzer, Scott Sundby, and William K.S. Wang. Elizabeth Wendell Butler of the *Fordham Urban Law Journal* was an effective, patient editor. Finally, my Hastings student research assistants Stephen Brundage, Laurel Derry and Brian Owens provided excellent and tireless assistance, as did indefatigable typists Ted V. Jang and Barbara Topchov.

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Introduction

Federal crimes have been accompanied by death penalties since the First Congress's first crime bill in April 1790.¹ However, unlike state prosecutors, federal prosecutors have not had to evaluate potential death penalty cases until the last few years.² From 1972, when the Supreme Court declared fully discretionary death penalty statutes unconstitutional in *Furman v. Georgia*,³ until 1988, when Congress enacted statutory procedures for imposing the death penalty for certain violations of the Continuing Criminal Enterprise ("CCE") statute,⁴ no constitutional federal death penalty provisions were on the books.⁵ The 1988 procedures, however, applied only to a single federal code section (CCE), which is infrequently charged.⁶ It was not until 1994 that Congress enacted generalized

1. See 1 Stat. 112-19 (1790).

2. In response to the Supreme Court's invalidation of all extant death penalty procedures in *Furman v. Georgia*, 408 U.S. 238, 257, 314 (1972), "the legislatures of at least 35 states . . . enacted new statutes that provide[d] for the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (per curiam) (Stewart, J.). Although some of these new State statutes have had to be revised in light of other post-*Furman* decisions, see, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 328 (1976) (invalidating mandatory capital punishment statutes enacted in response to *Furman*), it is still the case that many states have been implementing capital punishment since the mid-1970s.

3. 408 U.S. 238 (1972).

4. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7701, 102 Stat. 4181, 4387-95, (codified at 21 U.S.C. § 848(e)-(r) (Supp. 1998)); see *infra* Part I.E. (discussing the 1988 statute).

5. Of course, many federal statutes enacted before *Furman* did provide for death as a possible penalty, and they remained on the books after *Furman*. See, e.g., 18 U.S.C. §§ 794, 1111, 2031 (1986). David Bruck of the Federal Death Penalty Resource Center has aptly described these surviving but likely unconstitutional death penalty provisions as "zombie statutes." RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (1995-96 Supp.) at 105 n.4. Between 1972 and 1988, Congress did enact three new federal death penalty provisions, for air piracy, witness-killing, and espionage (military personnel only). See *infra* notes 174-178 and accompanying text; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1993 (1994), [hereinafter CAPITAL PUNISHMENT 1993]. But because no federal statutory procedures responsive to *Furman* and *Gregg* existed, neither the pre- nor post-*Furman* death penalty statutes were employed because of grave doubts regarding their constitutionality. See 5 Op. Off. Legal Counsel 224 (1981) (opining that general federal death penalty provisions are unconstitutional after *Furman* and *Gregg*); see, e.g., *United States v. Harper*, 729 F.2d 1216, 1224-26 (9th Cir. 1984) (declaring unconstitutional the death penalty provision of the general espionage statute, 18 U.S.C. § 794, due to lack of statutory procedures).

6. See *infra* note 187. This is not to say never charged. In fact, five of the 20 federal defendants currently on death row have been convicted and sentenced under the 1988 CCE provisions. Death Penalty Information Center, *Federal Death Row Prisoners* (visited Jan. 26, 1999) <<http://www.essential.org/dpic/fedprisoners.html>> [hereinafter *Federal Death Row Prisoners*].

federal death penalty procedures and extended them to over forty federal offenses, in the Federal Death Penalty Act of 1994 ("FDPA").⁷ In 1996, Congress added another four federal offenses to the death-eligible list.⁸ Thus, as a general proposition, the current generation of federal prosecutors has been in the business of death penalty prosecution for only the last four years.⁹

There has been virtually no scholarly presentation of the history of the federal death penalty, and little discussion of the new federal death penalty statutes.¹⁰ Little has been said about this changing aspect of the federal prosecutor's role, although it is well under-

The U.S. Supreme Court has never ruled on the constitutionality of the 1988 CCE death penalty procedures. Lower courts have uniformly upheld them, however. *See infra* Part I.E.; *see also* Peyton Robinson, Comment, *Judge Over Jury: Judicial Discretion in the Federal Death Penalty Under the Drug Kingpin Act*, 45 U. KAN. L. REV. 1491, 1494 n.25 (1997). The Supreme Court has granted certiorari in a federal death penalty case involving the 1994 statutory procedures, which are substantially similar to the 1988 CCE procedures. *See* United States v. Jones, 132 F.3d 232 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 39 (Oct. 5, 1998). In *Jones*, the Court will likely put to rest any major doubts regarding the constitutionality of both the 1988 and 1994 systems.

7. *See* Pub. L. No. 103-322, 60002(a), 108 Stat. 1796, 1959-82 (1994) (codified at 18 U.S.C. 3591-99 (1994)); *see infra* Part I.F.3. (discussing the 1994 Act in more detail).

8. Pub. L. No. 104-132, 110 Stat. 1214, 1286, 1292, 1296, 1330 (1996).

9. Of course, earlier generations of federal prosecutors did prosecute death penalty cases. One well-known example was prosecuted in New York, when Assistant United States Attorney Roy Cohn and others prosecuted Julius and Ethel Rosenberg for espionage under 18 U.S.C. § 794. *See* United States v. Rosenberg, 109 F. Supp. 108 (S.D.N.Y. 1953) (re-affirming death sentence).

10. Historical accounts tend to focus on the States' implementation of capital punishment, and discuss the federal provisions tangentially if at all. *See, e.g.*, JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 19 (1960) (one sentence); HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 1-14 (1964) [hereinafter BEDAU 1964] (two sentences). As for the new federal death penalty provisions, one chapter in Randall Coyne and Lyn Entzerorth's casebook, *see* COYNE & ENTZEROTH, *supra* note 5, at 649-84, does address "The Federal Death Penalty." Three pre-1994 articles address the 1988 CCE provisions. *See* Brian Serr, *Of Crime and Punishment, Kingpins and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision — Problems of Interpretation and Constitutionality*, 25 ARIZ. ST. L. J. 895 (1993); Peggy M. Tobolowsky, *Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders*, 18 J. CONTEMP. L. 47 (1992); Sandra D. Jordan, *Death for Drug Related Killings: A Revival of the Federal Death Penalty*, 67 CHICAGO-KENT L. REV. 79 (1991). One student comment addresses the constitutionality of a proposed "Drug Kingpin Death Penalty Act." *See* Sandra R. Acosta, Recent Development, *Imposing the Death Penalty upon Drug Kingpins*, 27 HARV. J. LEGIS. 596 (1990). Four student Comments address the 1994 FDPA. *See* Charles C. Boettcher, Comment, *Testing the Federal Death Penalty Act of 1994*, 18 U.S.C. §§ 3591-98 (1994): United States v. Jones, 132 F.3d 232 (5th cir. 1998), 29 TEX. TECH. L. REV. 1043 (1998); John P. Cunningham, Comment, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939 (1998); Robinson, *supra* note 6; Charles Kenneth Eldred, Recent Development, *The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293 (1994).

stood that the availability of the death penalty can dramatically affect the prosecution of a death-eligible case.¹¹ In addition, the Department of Justice's ("DOJ") internal death penalty review procedures have not been subjected to scholarly analysis, despite their inclusion in the *United States Attorneys' Manual* since 1995.¹² The job of a high-level committee at "Main Justice,"¹³ which reviews and approves all federal death penalty prosecutions across the country, is a new role that began only five years ago.

A. Overview of the Article

This Article provides a detailed exegesis and evaluation of the federal death penalty, including its 209-year history, recent developments in federal death penalty case law, and the process for national administration of the federal death penalty implemented by Attorney General Janet Reno in 1995. The Article is both descriptive and evaluative, and is divided into two respective parts. While lengthy, it is by no means exhaustive. Rather, in many regards it should serve merely as a starting point and resource for further scholarship in this specialized area.¹⁴

11. For example, "death qualified juries," which are said to be more "conviction prone," can be, although they ethically should not be, sought strategically. Conversely, because of its daunting moral force, a potential death penalty can make already hard-to-win cases impossible. See *infra* Part II.A.2.

12. At the height of the UnaBomer case, the *Washington Post* did publicize what it called the Department's "secret" capital case review panel in a newspaper article. See Roberto Suro, *How a Federal Case Becomes a Capital Case; Secret Panel Must Weigh Legal Issues, Cost of Prosecution and Public Demands for Vengeance*, WASH. POST, Jan. 11, 1998, at A14. However, the existence of the Department's Capital Case Review Committee and its procedures are no secret to those familiar with the process. They are published in the U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.000 (Aspen Law 1987) [hereinafter DEP'T OF JUSTICE MANUAL].

The UNITED STATES ATTORNEYS' MANUAL is a detailed set of guidelines issued by the DOJ to guide interpretation of criminal statutes. A copy of the UNITED STATES ATTORNEYS' MANUAL was published in 1987 by Prentice Hall under the title DEP'T OF JUSTICE MANUAL (currently Aspen Publishers, Inc.) in a multi-volume looseleaf format. It is updated annually. The DOJ has more recently made the guidelines available in an online format that is updated with greater regularity by the DOJ. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (updated Jan. 8, 1999) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/> [hereinafter UNITED STATES ATTORNEYS' MANUAL].

13. See JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE 7 (1996) (noting that the DOJ's headquarters in Washington D.C. is "known as Main Justice").

14. It is a bit intimidating to attempt to write anything in the area of capital punishment. Some of the greatest legal intellects of this generation, such as Professors Charles Black and Anthony Amsterdam, have concentrated on the topic, and as noted capital punishment expert Professor Hugo Adam Bedau wrote in the preface in 1996 "the wealth of relevant literature is little short of overwhelming." HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES vi (1997)

Part I presents the history of the federal death penalty, the recent statutes and relevant case law, and the DOJ's procedures for administering federal death penalty prosecutions. This part begins with history, because little, if any, detail regarding the legislative history of the federal death penalty has been published over the past two centuries. Much original source-mining is summarized here. Nevertheless, given the burden of the remainder of the Article, this historical account is more brief than the topic could support.

Part I also describes the 1988 and 1994 statutory procedures for imposing the federal death penalty, and briefly reviews some of the case law leading to, and resulting from, those statutes. There seems little doubt that in light of the Supreme Court's decisions in *Furman*,¹⁵ *Gregg*,¹⁶ and *McCleskey*,¹⁷ the new federal statutory procedures for imposing capital punishment are constitutional on their face.¹⁸ However, providing a definitive analysis of the statutes and their constitutionality is not the objective of this Article. Rather, Part I concludes by presenting in some detail the procedures that Attorney General Janet Reno implemented in January 1995 to attempt to regulate the national administration of the federal death penalty. New statistical data regarding the results of DOJ's review process is also presented here.

[hereinafter BEDAU 1997]. Professor Bedau begins his 1997 book by apologizing that "no one volume can do full justice to all the important" issues. *Id.* Imagine the temerity, then, of a single, if overlong, law review article. This Article is limited to discussion of the *federal* death penalty, and even then it is incomplete on many points. For example, this note is the only mention of the international law aspects of capital punishment, which generate rich contemporary scholarship regarding the domestic as well as worldwide arena. See, e.g., Hernan de J. Ruiz-Braug, *Suspicious Capital Punishment: International Human Rights and the Death Penalty*, 3 SAN DIEGO JUSTICE J., 379 (1995); Ved P. Nanda, *Recent Developments in the United States and Internationally Regarding Capital Punishment: An Appraisal*, 67 ST. JOHN'S L. REV. 523 (1993); Ariane M. Schreiber, Note, *States that Kill: Discretion and the Death Penalty - A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263 (1996). Finally, I also apologize to the many authors whose works I have read but been unable to cite here.

15. *Furman v. Georgia*, 408 U.S. 238 (1972).

16. *Gregg v. Georgia*, 428 U.S. 153 (1976).

17. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

18. The *Jones* case, in which the Supreme Court has granted *certiorari*, appears to raise only "as applied" challenges regarding the 1994 FDPA. See *supra* note 6; *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 39 (Oct. 5, 1998) (No. 97-9361) (presenting three questions regarding jury instructions under the statute and application of the statute's "harmless error" appellate review standard). Yet in the course of deciding the difficult as-applied challenges presented in *Jones*, the Court is likely to comment on the predicate question of the constitutionality of the federal statutory provisions on their face.

Part II evaluates the Attorney General's capital case review process and suggests a number of possibilities for improvement. For over a decade, the *United States Attorneys' Manual* has required federal prosecutors to obtain prior written authorization from the Attorney General before proceeding with a federal death penalty prosecution.¹⁹ More recently, the establishment of a high-level Capital Case Review Committee within the DOJ in 1995²⁰ and the effort to regularize the national prosecution of federal capital cases is a unique and laudable effort by Attorney General Janet Reno to attempt to secure fair and consistent administration of the death penalty at the federal level. This Committee theoretically reviews every potentially death-eligible federal prosecution in the country, in order to advise the Attorney General about whether or not to authorize a pursuit of a death penalty. The Committee produces written, although currently non-public, memoranda explaining its recommendations. This Article posits that, in effect, the DOJ Committee acts as a national moderator of capital punishment, and its written recommendations represent a developing body of "common law" precedent regarding the appropriate interpretation of, and standards for applying, the death penalty at the federal level.²¹

So that my presumed biases are clear, for roughly seven months in 1996-97, I served as a member of this Committee. Without breaching confidences, I hope to present an accurate picture of the Committee's work and praise the positive approach I think it represents. At the same time, however, I criticize the Attorney General's review system for not reviewing enough, and I suggest

19. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12 § 9-10.000 (Oct. 1, 1988); *accord id.* § 2-148 (1999).

20. See *id.* § 9-10.050.

21. It should be noted at the outset that this Article evaluates the DOJ's death penalty administration efforts within the framework of a "national uniformity" objective that has been set by the Attorney General and Congress. This objective embodies concepts of "procedural" uniformity as well as rough "substantive" uniformity. This Article accepts national "consistency" as the preferred policy goal stated by the Attorney General, and elimination of "disparities" as Congress's general position regarding federal sentencing. See *infra* Part II.B.1. While one can imagine a different system — one which accepts or even encourages regional differences in death penalty administration — such a statutory system has not been expressly written by Congress nor endorsed by the DOJ. This Article does not attempt to evaluate further the merits of a different statutory system, not proposed by the Attorney General or enacted by Congress, which might endorse national lack of uniformity in administration of a federal death penalty. Cf. Charles P. Sifton, *Theme and Variations: The Relationship Between National Sentencing Standards and Local Conditions*, 5 FED. SENT. REPTR. 303 (1993). The author hopes to take on the intriguing questions raised by a concept of "uniformity" in federal criminal sentencing in a future article.

possible changes to address some serious concerns that remain. Regional disuniformity, unconscious racial bias, and the manipulability of language are among the concerns addressed below. Despite the Department's efforts, such issues continue to give pause regarding human administration of the "awesome responsibility" that death penalty statutes necessarily impose on all involved.²²

Here is a quick summary of concerns and suggestions detailed in Part II. First, the current DOJ review system almost certainly does not capture all cases in which a federal death penalty might potentially be sought. Yet national uniformity is not possible so long as many exercises of prosecutorial discretion continue to go unreviewed. Second, it seems likely that "unconscious racial empathy"²³ on the part of federal prosecutors also contributes to a lack of uniformity in administration of the federal death penalty. This Article suggests that to address regional lack of uniformity and unconscious racial empathy, the Department should institute, at least on a trial study basis, a broader and more rigorous national review system for potential federal death penalty cases. A system that enables Main Justice personnel to study *all* cases that are eligible to enter the federal system as capital cases might enable the Department to root out gross instances of regional disuniformity as well as racial disparities of the sort discussed in *McCleskey*.

In addition, the written criteria of post-*Furman* statutes are necessarily general and, therefore, capable of manipulation in the hands of talented attorneys. This again leaves in doubt the likelihood of uniform application. Yet the inherent manipulability of language cannot be eliminated. The Department could, however, benefit from a study of its Review Committee's written memoranda, which are (consciously or otherwise) developing, case-by-case, more precise and regularized standards for applying federal death penalty legislation.²⁴

22. *Gregg*, 428 U.S. at 226 (White, J., concurring) ("Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it."). In this regard, this Article is self-consciously agnostic regarding the advisability of the death penalty. Instead, accepting the status quo, the Article attempts to suggest how to improve federal death penalty administration if we are to have it.

23. This concept is explained and developed below. See *infra* Part II.

24. Notably, the authority to promulgate standards for federal criminal punishment has been delegated by Congress for most federal offenses to the United States Sentencing Commission. See 28 U.S.C. § 994. Over ten years ago, however, the Commission decided not to go forward with an effort to promulgate guidelines for death penalty cases, questioning whether it had legal authority to do so as well as noting the "political" dangers of attempting to regulate in such a sensitive area. See *Mistretta v.*

Finally, after discussing these concerns and possible remedial measures, the Article posits that, by selecting from a pool of federal "death-eligible" cases only those that are most aggravated for authorization of capital prosecution, the Attorney General and her Review Committee are in effect implementing a variation of Justice Stevens' suggestion in *McCleskey* that only the most aggravated capital cases should be eligible for imposition of the death penalty.²⁵ If a broader and more certain Main Justice review of all possible death penalty cases from all federal districts in the country were instituted, it would force a national dialogue about capital punishment among all federal prosecutors, including those who doubt the validity of the death penalty but currently remain silent about their opposition. Such a broad prosecutorial dialogue could produce even more rigorous standards for federal death penalty prosecutions. This *de facto* implementation of the "Stevens Solution" is not inconsistent with the 1994 federal death penalty legislation, which was a product of political compromise by some members of Congress who did not favor capital punishment, and which requires federal prosecutors to "believe" that the death penalty is "justified" in a specific case before seeking death.²⁶

B. From the Hanging of Victor Feguer to the Millennium

It has been over thirty-five years since the last federal execution. At 5:30 a.m. on February 15, 1963, twenty-seven year-old Victor H. Feguer was publicly hanged at Fort Madison in Iowa for the kidnapping and murder of a young doctor.²⁷ Feguer had kidnapped his victim in Iowa and then made the mistake of driving with him ten miles across the state line into Illinois before shooting him.²⁸ By accident, the Federal Bureau of Investigation arrested Feguer

United States, 488 U.S. 361, 378 n.11 (1989); *Gubensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1256 (9th Cir. 1988) (describing the controversy); 'Political Realities' *Scuttle Death Penalty Plan*, NAT'L L.J., March 23, 1987, at 5. The field having been left open, then, the DOJ may properly seek to develop its own standards. Moreover, Departmental standards seek to guide the discretion of its own executive branch personnel, rather than that of judges.

25. See 481 U.S. at 367 (Stevens, J., dissenting).

26. 18 U.S.C. § 3593(a) (1994); see *infra* notes 368-369 (discussing legislative history of the FDPA).

27. See Neil Shively, *Feguer Dies for Dubuque Slaying*, TELEGRAPH-HERALD, Mar. 15, 1963, at 1; Kelley Matt, *Ex-Governor Condemns Capital Punishment*, DES MOINES REG., March 16, 1993, at 4.

28. See 18 U.S.C. § 1201(a)(1) (1959) (kidnapping where person is "willfully transported in interstate . . . commerce" is a federal crime); *Feguer v. United States* 302 F.2d 214, 218-20 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962); *Last Execution Was in Iowa*, DES MOINES REG., June 14, 1997, at 6.

(who was by then in Alabama) and the case was charged federally and tried in U.S. District Court in Iowa.²⁹

Then, as now, once Feguer's jury recommended that he receive the death sentence, imposing that sentence was mandatory.³⁰ There is no "judge-override" procedure in federal capital sentencing. Moreover, while today's post-*Furman* federal death penalty statutes provide some guidance to the jury regarding what factors they may consider, Feguer's jury received none. Nevertheless, if the federal government had declined to prosecute the case or had accepted a plea bargain, Feguer could have avoided the death penalty. This constant remains: the exercise of charging and plea-bargaining discretion on the part of federal prosecutors is a hugely important factor in determining which criminal defendants live or die.

Before Victor Feguer was executed, Iowa's then-governor Harold Hughes is reported to have asked President Kennedy to commute the sentence.³¹ It thus seems clear that Feguer would not have been executed had state rather, than federal, prerogatives controlled.³² Similarly today, the states are not in agreement regarding capital punishment. Almost one-quarter of the States (twelve) currently do not authorize the death penalty at all, and another seventeen States rarely implement it.³³ But meanwhile, Congress has enacted a nationally-applicable federal death penalty structure and has stated a general sentencing policy that regional "disparities" should be avoided.³⁴ In addition, the Attorney Gen-

29. See *Feguer*, 302 F.2d at 223-26. The actual murder was committed in the state of Illinois; federal venue in Iowa resulted from the location of the kidnapping. Of course, Feguer had also committed serious state offenses: murder chargeable in Illinois, and a kidnapping which Iowa state authorities could have charged. See *United States v. Feguer*, 192 F. Supp. 377, 379-83 (N.D. Iowa 1961). Instead, mere chance brought the FBI into Feguer's life — they mistook him for a different federal fugitive. See 302 F.2d at 224. This random fortuity together with his crossing state lines landed Feguer in federal rather than state court, in a State where the governor *opposed* Feguer's capital punishment but could do nothing to prevent it.

30. Compare 18 U.S.C. § 1201(a) (1959) (kidnapping where victim not released unharmed "shall" be punished by death, "if the jury shall so recommend") with 18 U.S.C. § 3594 (1998) (where federal jury recommends death sentence, "the court shall sentence the defendant accordingly").

31. See Matt, *supra* note 27.

32. The Supremacy Clause, of course, appears to render this a legally irrelevant point. See U.S. Const., art. VI, cl.2 ("The . . . Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .").

33. See *infra* notes 487-490.

34. See Sentencing Reform Act of 1984, Pub. L. 98-473, *codified at* 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3553(a)(6) (1998) (stating a federal sentencing policy of

eral has announced national guidelines to govern "all Federal cases in[volving] . . . an offense subject to the death penalty," in order to achieve "consistency and fairness."³⁵ Thus, while the Attorney General seeks to achieve national uniformity in the administration of the federal death penalty, no such conformity among the states exists. Significant federalism and state sovereignty issues lurk beneath the surface of a nationally uniform federal death penalty.³⁶

Although Feguer's hanging generated a banner headline in the Dubuque *Telegraph-Herald*, it received no mention at all in *The New York Times* or other newspapers of national note.³⁷ The significance of this execution becomes clear only now: Victor Feguer's hanging was likely the last federal execution in the twentieth century.³⁸

"avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct").

35. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12 §§ 9-10.010-10.080.

36. Perhaps the most interesting sovereignty and federalism questions arise in Puerto Rico, whose Constitution expressly prohibits capital punishment. Puerto Rico is not a State, but it does constitute one of the 94 federal judicial districts in the United States. Because of Puerto Rico's commonwealth relationship with the United States, Congress effectively had to approve its constitution when accepting the relationship. Thus, it can be argued that Congress has effectively stated two competing policies for Puerto Rico: prohibition of capital punishment in the constitutional document, while providing applicable death penalties in the 1988 and 1994 federal statutes. Moreover, because violent crime is unfortunately prevalent in Puerto Rico, the local authorities have entered into a "Memorandum of Understanding" with the local U.S. Attorney's office, agreeing that the federal authorities will prosecute much of the "local" violent crime, such as car-jackings, in Puerto Rico. As a result, the Puerto Rico U.S. Attorney's Office has submitted the largest number of potential death penalty cases (59) of any of the 94 federal districts since the Capital Case Review protocol was issued in 1995. Yet, the local, largely Catholic population opposes capital punishment. The effect, if any, of this complex set of facts on federal death penalty prosecutions remains uncertain.

37. Shively, *supra* note 27. Proof of this is based upon the negative results from a review of microfilm indices of the *New York Times*, *Wall Street Journal*, *Christian Science Monitor* and the *Los Angeles Times* for March 15, 1963, and the following week.

38. Other interesting points about the Feguer case: (1) his hanging reportedly took over nine minutes, *see id.*, yet, in 1994, the Ninth Circuit upheld hanging as a constitutional execution method, assuming it caused "rapid unconsciousness" and death "within . . . seconds," *Campbell v. Wood*, 18 F.3d 662, 681-87 (9th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1215 (1994), 511 U.S. 1119 (1994); (2) Feguer's conviction and death penalty were affirmed by an opinion authored by then Eighth Circuit Judge Harry Blackmun, who three decades later concluded that the death penalty cannot be constitutionally administered, *see Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); (3) after his arrest in Birmingham, Alabama, Feguer was briefly represented by Hugo L. Black, Jr., described by the Eighth Circuit simply as "a competent lawyer and one experienced in federal court matters." 302 F.2d at 226. This likely was the son of then-Supreme Court Justice Hugo L. Black. *See* 371 U.S. 872 (1962) (Justice Black took no part in considering Feguer's petition for certiorari).

Surely the next federal criminal execution will receive more national attention;³⁹ and it seems just as certain that such an execution will occur. After sixteen years of federal stalemate in the wake of *Furman*, Congress enacted procedures in 1988 for constitutionally imposing a death penalty for violation of a serious narcotics statute, and extended similar (although not identical) procedures to over forty different federal offenses in 1994.⁴⁰

Then, on April 19, 1995, "a massive explosion tore apart the Murrah [Federal] Building in Oklahoma City, Oklahoma, killing a total of 168 people and injuring hundreds more."⁴¹ In 1997, Timothy McVeigh was sentenced to death for the bombing after conviction under two newly death eligible federal offenses, and his conviction and sentence have been affirmed by the Tenth Circuit.⁴² The enormity of the Oklahoma City bombing places a human face on the certainty of further federal executions. It was the largest act of domestic terrorism ever visited upon the United States; even an appellate court's relatively dry account of victim testimony at Mc-

In his dissent in *Furman*, Justice Blackmun, who had been the 1962 author of Feguer's appellate affirmation, perspicaciously noted that Feguer "may have been one of the last to be executed under federal auspices." 408 U.S. at 406. Feguer's execution was also the last execution in the state of Iowa, which repealed its death penalty in 1965 and remains one of 12 states with no death penalty. 41 *Executions; None Since '63*, DES MOINES REG., March 3, 1995, at 2.

Of course, it is possible that a federal prisoner could be executed prior to the year 2001. For example, David Paul Hammer, who was sentenced to death in November 1998 for murdering a fellow inmate while serving a 1,200-year Oklahoma state sentence in a federal prison facility, filed a *pro se* motion a month later asking to withdraw his appeal in order to "facilitate the expeditious implementation of . . . death." See Memorandum . . . In Opposition to Appellant's Pro Se Motion to Withdraw His Appeal, *United States v. Hammer*, No. 98-9011 (3rd Cir. Dec. 7, 1998) 1-2. Hammer later withdrew his motion and issues regarding his mental competence have been raised, making further deviation from the normal capital review process unlikely. Nevertheless, there is precedent for allowing a competent prisoner to drop all appeals and "volunteer" to be executed. See *Gilmore v. Utah*, 429 U.S. 1012 (1976). See also *infra* notes 199-205 (discussing *Chandler* and *Garza* cases).

39. Consider the intense media and judicial focus when California carried out its first state criminal execution in 25 years, of Robert Alton Harris in 1992. See, e.g., Katherine Bishop, *After Night of Court Battles, a California Execution*, N.Y. TIMES, April 22, 1992, at A2; *Vasquez v. Harris*, 503 U.S. 1000 (1992) (forbidding any further stays of Harris' execution). The Harris execution even generated a thoughtful essay by one of the federal judges who was deeply involved in the last-minute stay efforts at the Ninth Circuit. See John T. Noonan, Jr., *Horses of the Night: Vasquez v. Harris*, 45 *Stan. L. Rev.* 1011 (1993), and law review commentary in a leading journal, see Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 *YALE L.J.* 225 (1992).

40. See 18 U.S.C. §§ 3591-98 (1994).

41. *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998).

42. See *id.* at 1193-1222.

Veigh's sentencing brings tears to one's eyes.⁴³ While others may be on a faster track to execution,⁴⁴ none seem more certain than Timothy McVeigh.

Today the death penalty is now available under at least forty-one different federal code sections,⁴⁵ and there are twenty persons under sentence of death imposed by a federal court.⁴⁶ While the appellate and habeas processes are lengthy, constitutional attacks on the new federal death penalty procedures have uniformly been rejected.⁴⁷ Recently, the Supreme Court granted certiorari in a federal death penalty case which, while appearing to present difficult as-applied issues under the FDPA, seems likely to provide a vehicle for validating the new federal death penalty statutes on their face.⁴⁸ Thus, a thorough understanding of the federal death penalty and its implications is now an important part of the federal prosecutor's job.

43. See *id.* at 1218-22. Indeed, the crime was so extreme that the normally cautious Attorney General responded to a question about a potential death penalty at a Presidential news conference that same day by saying simply, "[w]e will seek it." *Nichols v. Reno*, 124 F.3d 1376, 1377 (10th Cir. 1997). Two and a half years of litigation ensued to rebut the argument that Ms. Reno had improperly prejudged the case. *Id.* Of course, the emotional impact of victim testimony in death penalty cases is precisely what makes its admission so controversial. See *Payne v. Tennessee*, 501 U.S. 808 (1991) (affirming admission and overruling contrary precedent); Beth E. Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601 (1998) (proposing guidelines to regulate the use of victim impact statements during capital sentencing proceedings).

44. See *infra* notes 199-205 (discussing *Chandler* case).

45. See *infra* note 242. The precise number of federal crimes currently subject to a death penalty is open to dispute, depending on how you count. The number of separate U.S. Code sections that provide a potential death penalty is 41, see U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1997 4, Table 2 (Dec. 1998) [hereinafter CAPITAL PUNISHMENT 1997]. However, some code sections define more than one offense. See, e.g., 18 U.S.C. § 844(d), (f), (i) (1998).

46. *Federal Death Row Prisoners*, *supra* note 6.

47. See *infra* note 205 and accompanying text.

48. See *supra* note 6. In *Jones*, the Fifth Circuit approved a jury instruction which suggested that Jones might receive some undefined "lesser sentence" if the jury deadlocked, and ruled that two improperly-duplicative non-statutory aggravating factors had been erroneously presented to the jury but were nevertheless "harmless" in determination of the sentence "beyond a reasonable doubt." *Jones*, 132 F.2d at 242-48, 252. The Supreme Court's grant of certiorari is limited to two questions regarding the jury instructions and one regarding application of the statutory harmless error standard. 119 S. Ct. 39, 40 (1998). While these questions raise serious issues about how the FDPA should be applied in specific cases, none of them are broad attacks on the statute itself.

I. A History of the Federal Death Penalty

The death penalty is not new to federal criminal law — only its current procedures are, after a quarter century hiatus. While the Constitution itself did not mention the death penalty, its framers did. Less than a year after the nation's constitutional formation, on April 30, 1790, Congress enacted mandatory death penalties for roughly a dozen newly-created federal offenses, and provided that the method of federal execution would be by hanging.⁴⁹ The history of the federal death penalty can be described in three broad historical movements: (1) establishing mandatory death penalties in 1790; (2) granting juries absolute discretion to not impose the death penalty in 1897; and (3) reinstating numerous "guided discretion" death penalties in 1994. In each of these actions, Congress has acted not as a leader, but rather as a follower of well-established state law trends.

A. The Framers' Actions

When establishing the Union in 1787, the Framers appear to have given little attention to the death penalty. This is unsurprising. Death as a penalty for serious felonies was common in the eighteenth century, and the Constitution simply assumes, without ever stating expressly, that capital punishment will be imposed. For example, the Fifth Amendment explicitly assumes that there will be "capital" crimes and suggests that persons may be deprived of "life," if such is accomplished with due process of law.⁵⁰

In the body of the Constitution itself, the death penalty is never mentioned. However treason, traditionally a capital offense, is mentioned in Article III, and Congress is expressly authorized to "declare the punishment of treason."⁵¹ The debate regarding this clause in the Constitutional Convention strongly indicates that the

49. 1 Stat. 119 § 33 (1790). The First Congress also provided that prisoners charged with federal capital offenses were entitled to counsel which the court was "required . . . to assign." 1 Stat. 118 § 29 (1790).

50. U.S. CONST. amend. V ("No person shall be held to answer for a *capital*, or otherwise infamous crime . . . nor shall any person . . . be deprived of *life* . . . without due process of law") (emphasis added). See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gatman ed., 1966) 46, 145-46 (1996).

51. U.S. CONST. art. III, § 3.

Framers assumed that treason would be punished by death,⁵² and the First Congress soon so provided.⁵³

In its First Session, from March to September 1789,⁵⁴ the First Congress addressed criminal law topics only tangentially, when necessary to the complete definition of other legislative structures.⁵⁵ Although a Senate Committee was appointed early in the First Session to “defin[e] the crimes and offences that shall be cognizable under the authority of the United States, and their punishment,” and the Senate passed such a bill, House action was deferred until the Second Session.⁵⁶ The First Session closed in September by proposing a twelve-article Bill of Rights to the States, ten articles of which were ratified by a sufficient number of States in 1791.⁵⁷ Thus our most basic constitutional criminal procedure tenets were not even drafted until the end of the First Session, and it seems unsurprising that the substantive definition of federal crimes and their punishment were not a discrete focus of attention until the Congress returned for its Second Session in January 1790.⁵⁸

Nevertheless, capital punishment was occasionally mentioned in the First Congress’ First Session, particularly in the first Judiciary

52. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966) 347 (describing that on Monday, Aug. 20, “Mr. King observed that the controversy relating to Treason might be of less magnitude than was supposed, as the legislature might punish capitally under other names than Treason.”). The “controversy” referred to revolved around how specifically “Treason” should be defined in the constitutional document, and whether treason committed against a State (as opposed to against the United States) could be separately punished. See *id.* at 345-50.

53. See 1 Stat. 112 Ch. 9 § 1 (1790).

54. The First Session of the First Congress ran from March 4 to September 29, 1789, in New York City. See 1 Stat. 23 (1789). The Second Session ran from January 4 to August 12, 1790. See 1 Stat. 99 (1790).

55. For example, in a lengthy “Act to regulate the collection of . . . Duties,” 1 Stat. 29-49 (1789), which was only the fifth Act passed for the new nation, Congress stated a number of “offence[s]” requiring “conviction.” *Id.* at 43 (§ 25, concealing or buying goods knowing that they are subject to seizure); 44 (§ 27, forcibly resisting or impeding customs officer); 46 (§ 35, dealing with bribes and false entries).

56. 1 ANNALS OF CONGRESS 35-6 (1834) (Senate committee appointed on May 13, 1789); *id.* at 55 (Senate Committee reports bill on July 28, 1789); *id.* at 55 (Senate passes bill on Sept. 1, 1789); *id.* at 866 (House receives bill on September 1, 1789); *id.* at 84 (on September 18, 1789, House informs Senate that it has agreed to postpone consideration of crime bill until the next session). *Id.*

57. See 1 Stat. 97-98 (1789). The proposed Bill of Rights contained 12 provisions, *id.*, but only 10 were ratified by a sufficient number of states. See 1 Stat. 21, n.(a) (1789). Thus, for example, the First Amendment to the Constitution was actually enumerated as the Third Article in the Bill of Rights that Congress proposed. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, 5 (1997).

58. 1 Stat. 99 (1790).

Act. For example, Section 29 of the Act contained an explicit death penalty venue and jury selection provision.⁵⁹ Section 33 provided that "where the punishment may be death," bail could be granted or denied only by order of, and at the discretion of, a *federal* court or judge.⁶⁰ Yet, it was not until Section 35 of the Judiciary Act that Congress provided for federal prosecutors, by directing the appointment in each federal district of a "meet person learned in the law to act as attorney for the United States" — the first mention of the office of U.S. Attorney in our nation's history.⁶¹

Having adjourned after establishing federal district courts in September 1789,⁶² the First Congress turned to completing the first attempt at drafting a federal criminal code when it returned for its Second Session in January 1790.⁶³ Four months later, on April 30, 1789, Congress enacted a lengthy "Act for the Punishment of Certain Crimes Against the United States."⁶⁴ Federal offenses of treason, murder, piracy and forgery were defined and, as was common

59. See 1 Stat. 88 sec. 29 (1789). "[I]n cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, 12 petit jurors shall be summoned from thence." *Id.* Whether there were any such federal death penalty cases at this time is an interesting historical question. Although there were no federal capital statutes yet, it is possible that there were federal prosecutions based on common law since it was not until 22 years later, in *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812), that the Supreme Court definitively ruled that federal district courts have no jurisdiction to handle non-statutory "common law" criminal offenses.

60. 1 Stat. 91 (1789). Consideration of bail issues in capital cases was thereby reserved for federal officials, while state judges were expressly permitted to act on bail in non-capital federal cases. See *id.*

61. See 1 Stat. 92 (1789) (according to Webster's, "meet" as an adjective means "suitable" or "qualified" (WEBSTER'S NEW INT'L DICTIONARY 1529 (2d ed. 1956))). The office of Attorney General was created in the same Section of the Judiciary Act, but only *after* the establishment of U.S. Attorneys for each federal district. See 1 Stat. 93 (1789). Many U.S. Attorneys would applaud the sense of priorities shown by the First Congress in this ordering.

62. 1 Stat. 98 (1789).

63. See 1 ANNALS OF CONGRESS 977 (1790) (Senate passes amended crime bill and sends it to the House on January 28, 1790).

64. 1 Stat. 112-19 (1790); see 1 ANNALS OF CONGRESS 1519-22 (House takes up and passes crime bill, April 5-10, 1790); *id.* at 999-1000 (on April 12 and 14, 1790, Senate reconsiders crime bill and "sundry amendments" passed by the House, and resolves to disagree with three proposed House amendments); *id.* at 1001 (House agrees to Senate version of crime bill on April 19, 1790). See generally CURRIE, *supra* note 57, at 93-7. It should be noted that a number of page citations regarding the crime bill in the Index to the ANNALS are erroneous. To keep the significance of the first crime bill in perspective, it should also be noted that the bill was not nearly as long nor as detailed as the First Congress's "Act to Regulate the Collection of Duties" on ships, vessels, and imports. See 1 Stat. 29-49 (1789).

for that age, the mandatory penalty upon conviction was set at death.⁶⁵ Death was also stated as the penalty for more arcane federal offenses.⁶⁶ While these offenses are arguably separate, some were described within a single section of the Act.⁶⁷ Thus, depending on how the offenses are counted, a federal death penalty was enacted in 1790 for roughly twelve federal offenses.⁶⁸

Notably, the death penalty provisions generated the only reported debate in either House regarding the entire crime bill.⁶⁹ In both instances, the legislative debate was eerily similar to debating points heard regarding capital punishment today. First, when the Senate returned to the crimes bill in January 1790, it added a provision, macabre by today's standards, to allow judges to order delivery of an executed defendant's body "to a surgeon for dissection."⁷⁰ When the House took up the bill in April 1790, a motion was made to strike the dissection provision as "wounding the feelings of the living, and it could do no good It was

65. See 1 Stat. 112, sec. 1 (1790) ("treason . . . shall suffer death,"); 1 Stat. 113, sec. 3 ("willful murder" on federal property "shall suffer death"); 1 Stat. 113-14, sec. 8 (piracy "shall suffer death"); 1 Stat. 115, sec. 14 (forgery and counterfeiting "shall suffer death"). See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (stating that by 1791, "the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses") (citing HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 5-6, 15, 27-8 (rev. ed. 1967)).

66. These offenses included: offenses committed on the high seas when punishable by death "if committed within the body of a county;" violent acts committed on a ship's commander to hinder defense of the ship or its goods; "mak[ing] a revolt in the ship;" "any act of hostility against the United States, or any citizen thereof, upon the high sea under colour of authority from any foreign prince or state;" aiding and abetting piracy; assisting forgery or uttering forged public securities; and rescue or freeing of anyone convicted of a federal capital offense. See 1 Stat. 113-14 sec. 8-10, 115 sec. 14, 117 sec. 23 (1790).

67. Just as today a number of separate offenses may be found within a single section of the U.S. Code.

68. See *infra* notes 241-242 (discussing the variable counting of federal offenses subject to the death penalty). Other federal crimes with lesser penalties were also defined in this first federal crime bill. See Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1063-64 (1995) [hereinafter Little, *Myths and Principles of Federalization*]. In addition, other punishments now fallen out of favor were stated: public whipping ("not exceeding thirty-nine stripes") for larceny, military supply theft, receipt of stolen goods or harboring felons or thieves, 1 Stat. 116, secs. 16-17 (1790), and one hour of "stand[ing] in the pillory" for perjury, 1 Stat. 116, sec. 18 (1790).

69. Other debate plainly occurred; however, it was not recorded in the ANNALS OF CONGRESS summary reports. See, e.g., 1 ANNALS OF CONGRESS 1522 (1789) (reporting, without additional detail, "further discussion" on the bill on April 8-9, 1789, and "several amendments.").

70. 1 ANNALS OF CONGRESS 977 (January 28, 1790). Cf. *An Organ Donation Offer on Death Row is Refused*, N.Y. TIMES, Sept. 9, 1998, at 23 (reporting refusal of Texas officials to allow condemned inmate to donate his organs at a hospital).

making the punishment wear the appearance of cruelty, which had a tendency to harden the public mind.”⁷¹ Supporters of the provision, however, argued that the provision made “those who had injured society to contribute to its advantage by furnishing subjects of experimental surgery,” and noted the “important improvements which had been made in surgery from experiments.”⁷² They also argued the benefit of general deterrence: the provision “was attended with salutary effects, as it certainly increased the dread of punishment.”⁷³ After two days of debate, with James Madison among others supporting the dissection provision, the motion to strike it failed.⁷⁴

Second, the House debated whether to remove the death penalty for passing counterfeit currency.⁷⁵ Opponents of the penalty noted that “the degrees of punishment ought to be proportioned to the malignancy of the offence,” and also argued that capital punishment for uttering “would tend to prevent convictions.”⁷⁶ Proponents, however, argued that there was little difference between forgery and uttering a forged bill, and forgery is a “crime against the most important interests of society, and of a peculiarly malignant tendency in the present and probable situation of the United States.”⁷⁷ The unlikely prospects of rehabilitation were also stressed: “[p]ersons addicted to forgery are seldom, if ever, reclaimed – the security of the society, therefore, appears to depend on a capital punishment.”⁷⁸ In the end, the death penalty for uttering remained in the bill.

The First Congress also seemed to recognize that cases involving a potential death sentence are different,⁷⁹ specifying special procedures for the handling of federal capital cases. Such procedures

71. 1 ANNALS OF CONGRESS 1520 (April 5, 1789).

72. *Id.*

73. *Id.*

74. *See id.* (April 6, 1789). The provision as enacted appears at 1 Stat. 113, sec. 4 (1790). The First Congress was quite serious about the dissection option: they made it a separate federal crime to forcibly rescue or attempt to rescue an executed federal offender's body. *See* 1 Stat. 113, sec. 5 (1790).

75. *See* 1 ANNALS OF CONGRESS 1521 (April 7, 1789).

76. *Id.*

77. *Id.*

78. *Id.*

79. Justice Stewart appears to have coined this phrase, *see Furman*, 408 U.S. at 306 (Stewart, J., concurring) (opening sentence: “The penalty of death differs from all other forms of criminal punishment, not in degree but in kind”), although the sentiment had previously been expressed by others. *See e.g.*, *United States v. Palmer*, 16 U.S. 610, 628 (1818) (“in expounding a law which inflicts capital punishment, no over rigid construction ought to be admitted”). *See generally* Daniel Ross Harris, *Capital*

included the appointment of up to two "counsel learned in the law," required to be given "free access at all seasonable hours" to their client, full rights of compelled process for witnesses, and the required production of an advance copy of the jury list "two entire days at least before the trial."⁸⁰ In addition, the "benefit of clergy," a common law mechanism that had developed as a way of avoiding the mandatory death penalty for first offenders, was expressly prohibited for any federal defendant convicted of a capital crime.⁸¹ Finally, the First Congress specified the manner of federal execution as "by hanging the person convicted by the neck until dead."⁸²

The federal death penalty thus has been part of our national structure since our country's earliest origins. At least a dozen federal capital offenses were defined by the First Congress, with death penalties mandatory upon conviction and special procedures specified for the trial of capital punishment cases. While there has been a hiatus in federal executions for thirty-six years, and constitutional implementation procedures were not enacted until sixteen years after *Furman*, the federal criminal code⁸³ has never lacked specified, statutory death penalty offenses, from 1790 to the present day.⁸⁴

Sentencing After Walton v. Arizona: A Retreat for the "Death Is Different" Doctrine, 40 AM. U. L. REV. 1389 (1991).

80. 1 Stat. 118-19, sec. 29 (1790). The Sixth Amendment, which guarantees "compulsory process" for all criminal prosecutions, had of course not yet been adopted.

81. See 1 Stat. 119, sec. 31 (1790). See GEORGE W. DALZELL, BENEFIT OF CLERGY IN AMERICA (1955); BEDAU 1964, *supra* note 10, at 4 n.6 (noting that "without benefit of clergy" meant "not that a condemned man must go to his grave without the consolations of a spiritual advisor . . . but that his conviction for a capital crime was not subject to a reduction").

82. 1 Stat. 119, sec. 33 (1790).

83. The phrase "federal criminal code" is a misleading euphemism, describing hundreds of criminal provisions scattered throughout dozens of Titles in the United States Code. See Little, *Myths and Principles of Federalization*, *supra* note 68, at 1035 n.21; Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 53 (1998).

84. *Accord Furman*, 408 U.S. at 465 (Rehnquist J., dissenting) (stating "our Nation's legislators have thought [capital punishment] necessary since our country was founded"); 137 CONG. REC. S8496-01, 8499 (daily ed. June 24, 1991) (statement of Sen. Hatch: "There has always been a federal death penalty"). See also COYNE & ENTZEROTH, *supra* note 5, at 683 & 1995-96 Supp. at 105 n.4 (noting that while all federal death penalty statutes were likely unconstitutional after *Furman*, they were "never amended nor . . . deleted," and thus survived as "zombie statutes").

B. From 1790 to the 1897 Act to Making the Federal Death Penalty Fully Discretionary

Thirty-five years after federal capital crimes were first defined, the House of Representatives directed the President to report on the number of convictions, pardons, and executions for such offenses.⁸⁵ In 1829, the President reported that in the Nation's first thirty-six years, there had been 138 federal capital trials, yielding 118 convictions.⁸⁶ Of these, forty-two offenders had been executed and sixty-four had been pardoned.⁸⁷ The perceived harshness of mandatory death penalty statutes appears to have been demonstrated early on by this high percentage of pardons.

Indeed, by the mid-nineteenth century, a national movement had formed to ameliorate the States' mandatory capital punishment structures, in response to merciful instincts as well as a more pragmatic concern regarding acquittals due to "jury nullification" in sympathetic cases.⁸⁸ In 1845, the American Society for the Abolition of Capital Punishment was founded.⁸⁹ By the 1890s (the Civil War having provided an intervening distraction), a number of states had made capital punishment discretionary even after conviction.⁹⁰ The shift to discretionary capital punishment was a compromise between ardent capital punishment abolitionists and those who still favored the death penalty.⁹¹ Postbellum race prejudice likely also played a role, as discretionary capital sentencing enabled all-white juries to dispense death penalties "in the desired manner," along racial lines.⁹²

85. H. RES. 545 (Jan. 13, 1825), *reported in* H.R. REP. NO. 53-545, at 6 (1894).

86. H.R. EXEC. NO. 20-146 (1829), *reprinted in* H.R. REP. NO. 53-545, app. at 6, table 1.

87. *See id.* Of the 12 remaining federal capital offenders, "[o]ne suicided; 3 died; 2 escaped; and 6 [were] unaccounted for." *Id.* This rather sanguine presidential report of escaped and "unaccounted for" federal capital offenders seems quite unimaginable today.

88. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 9-10 (3d ed. 1982) [hereinafter BEDAU 1982]. *See* *Winston v. United States*, 172 U.S. 303, 310 (1899) (noting "the reluctance of jurors to concur in a capital conviction"); *see generally* ROBERT H. LOEB, JR., *CRIME AND CAPITAL PUNISHMENT* 29 (1978) (containing a brief description of nineteenth century movement against widespread capital punishment).

89. *See* BEDAU 1964, *supra* note 10, at 21; LOEB, *supra* note 88, at 29.

90. *See* BEDAU 1982, *supra* note 88, at 9-10; *see also* BEDAU 1964, *supra* note 10, at 28.

91. *See* BEDAU 1964, *supra* note 10, at 27-28; BEDAU 1982, *supra* note 88, at 11; H.R. REP. NO. 54-108 at 2 (1896) (recommending passage of 1897 ameliorating bill because "the people are not . . . ready for total abolition").

92. BEDAU 1982, *supra* note 88, at 11; *see also* Kenneth M. Murchison & Arthur J. Schwab, Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97, 106-07 (1972).

In 1892, Newton M. Curtis, a Civil War hero of some note and later a Congressional Representative from New York, introduced a bill for "the total abolition of the [federal] punishment of death."⁹³ In 1894, Curtis published an influential report on capital punishment, designed to support his federal abolition bill and described by his House colleagues as "probably the most thorough and exhaustive [study] ever made in this country."⁹⁴ Representative Curtis appears to have been the single most influential force behind the first alteration in federal death penalty policies in over a century.

Congress did not entirely abolish federal capital punishment in response to Curtis's report. But it did enact a bill in 1897 entitled "An Act To Reduce The Cases In Which The Death Penalty May Be Inflicted,"⁹⁵ a law which is now largely forgotten. This statute abolished the death penalty for all but five federal statutory sections, substituting a sentence of life imprisonment at hard labor for many previously capital offenses.⁹⁶ Moreover, the 1897 Act effectively made all federal capital punishment completely discretionary by expressly authorizing the jury in any federal murder or rape case that remained death-eligible to qualify its verdict of conviction by adding the words "without capital punishment," in which case a life imprisonment sentence had to be imposed.⁹⁷ Because the other three federal code sections for which death remained a possi-

93. Newton M. Curtis, *The Death Penalty Undesirable and Not Sustained by Divine Authority*, reprinted in VOICES AGAINST DEATH 143 (Phillip English Mackey, ed., 1976) (describing H.R. 7197 of the 52d Congress). Curtis joined the Union army and rose to the rank of Brigadier General before the age of 30. He must have been a remarkably persuasive person; he was elected to the New York State Legislature in 1884 and by 1890 persuaded the Assembly to vote 75-29 for the abolition of the death penalty. He spoke convincingly of his experience as a military commander who had to administer martial law, presumably including ordering military executions. See *id.* at 141 (detailing Curtis's biographical information); *id.* at 146 (Curtis notes "[t]he large number of executions which took place in the Army during the late war").

94. NEWTON M. CURTIS, CAPITAL CRIMES AND THE PUNISHMENTS PRESCRIBED THEREFOR BY FEDERAL AND STATE LAWS AND THOSE OF FOREIGN COUNTRIES, WITH STATISTICS RELATING TO THE SAME (1894) [hereinafter CURTIS REPORT], reprinted in H.R. REP. NO. 53-545, app. at 1, 5 (1894). General Curtis's Report was appended to this 1894 House Report as well as to an 1895 Senate Report and an 1896 House Report, all of which addressed the proposed death penalty legislation that was finally enacted in 1897. See S. REP. NO. 53-846 at 2 (1895); H.R. REP. NO. 54-108 at 3 (1896).

95. Act of Jan. 15, 1897, ch. 29, 29 Stat. 487 (1898).

96. See *id.*, sec. 3.

97. *Id.*, sec. 1. The 1897 Act was a separate, free-standing section in the federal code, and the offense-defining statutes for murder and rape still indicated that the death penalty was mandatory. See *Rev. Stat. of the U.S.* §§ 5339, 5345 (2d ed. 1878).

ble penalty already included discretionary provisions,⁹⁸ mandatory federal death penalties were in fact entirely eliminated by the 1897 Act.

The Congressional Reports on the 1897 legislation all included Curtis's claim that the conviction rate from 1789 to 1826 for federal capital cases had been 85%, but by 1897 was "less than 20 percent in the Federal courts and still less in the State Courts."⁹⁹ They also reproduced Curtis's statistics showing that from 1890-1894, while there had been 727 lawful executions in the States and territories, there had been 1,118 lynchings.¹⁰⁰ Curtis decried the "uncertain and abortive" status of statutory capital punishment, leading to what he suggested was the consequent increase in extra-legal resorts to "Judge Lynch's Court."¹⁰¹ The final House Report also reprinted an interesting letter from the U.S. Attorney in Paris, Texas, who represented that he currently had seventy-three murder cases set for trial and urged speedy passage of the bill because the "severity" of the mandatory death penalty "prevents the juries from either reaching a verdict or leads them to acquit the defendant."¹⁰²

In 1899, the Supreme Court approved the 1897 Act which lodged absolute discretion regarding imposition of the federal death penalty with the jury, in three companion cases heard under the caption of *Winston v. United States*.¹⁰³ The Court noted "[t]he difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances," and explained the broad legislative grant of discretion to capital juries as a "more simple and flexible rule."¹⁰⁴ The Court

98. The other three sections in the Revised Statutes for which death remained an available, but discretionary, penalty were two military codes, Rev. Stat. § 1342, Articles of War for the Army, and Rev. Stat. § 1624, Articles for the Navy, and the treason statute, Rev. Stat. § 5332. See, e.g., *Rev. Stat. of the U.S.* at 232, 239; 276-77; 1036 (2d ed. 1878). The military sections both provided that offenders "shall suffer death or such other punishment as a court-martial may direct," and the treason statute provided for punishment by death or no less than five years at hard labor in the discretion of the judge. *Id.*

99. H.R. REP. NO. 54-108 at 3.

100. See CURTIS REPORT, *supra* note 94, at 6-7, table 3.

101. *Id.* at 3.

102. H.R. REP. NO. 54-108 at 1.

103. See *Winston v. United States*, 172 U.S. 303 (1899). All three cases came from the District of Columbia, an exclusive federal enclave; and by coincidence or otherwise, all involved murders committed by men upon their female lovers. See *id.* at 304-08.

104. *Id.* at 312. This foreshadowed the debate regarding the feasibility of drafting written capital punishment criteria that separated Justices Harlan and Brennan in *Mc-*

reversed the death sentences in the cases because the trial judge had instructed the juries that the 1897 statute did not permit them to qualify their capital verdict unless "mitigating or palliating circumstances were proved."¹⁰⁵ This was error because the statute did not so limit the juries' discretion. Instead, federal law now committed "to the sound discretion of the jury, and of the jury alone," the decision to be lenient whenever the jury concluded that such would be "just or wise," for any reason at all.¹⁰⁶

C. The Twentieth Century to *Furman*: Unguided Federal Discretion

The absolute and unguided discretion granted to federal juries at the turn of the twentieth century remained the heart of federal death penalty procedural law until *Furman* was decided in 1972.¹⁰⁷ Although the United States Code was revised twice, in 1909 and 1948, the discretionary "without capital punishment" option was carried forward for murder.¹⁰⁸ It was dropped with regard to rape in the 1948 revision of the federal criminal code, because the substantive sentencing provision for rape was amended to permit imposition of "death or imprisonment for any term of years or for

Gautha v. California, 402 U.S. 183 (1971). See *infra* notes 689-690 and accompanying text (discussing *McGautha*).

105. *Winston*, 172 U.S. at 313, 305-09.

106. *Id.* at 313. The Court cited similar judicial decisions in four states with similar statutory provisions. See *id.*

107. See *Furman*, 408 U.S. 238.

108. Act of March 4, 1909, ch. 321, reprinted in 35 Stat. 1088-1159; Pub. L. No. 80-772 (1948), reprinted in 62 Stat. 683-868. The 1948 revision of the federal criminal code, which first created Title 18, was a mammoth five-year project labelled "Epochal Legislation" on the cover of the special (and now hard-to-find) 668-page "pamphlet" of the 1948 U.S. CODE CONG. SERVICE issued to report the Act's legislative history.

In the 1909 revision, the substantive murder and rape sections were kept separate from the 1897 ameliorating legislation, so that a mandatory death penalty appeared to be stated where the offenses were defined but a separate section still gave the jury the option of stating "without capital punishment." Compare 35 Stat. 1143, 1152, sec. 273 (murder) and sec. 278 (rape) with sec. 330 (without capital punishment). In a significant ameliorating development, the 1909 revision also subdivided federal murder into first and second-degrees, and limited the death penalty to only first-degree murder convictions. See 35 Stat. 1152 sec. 273, 275.

In the 1948 revision, the discretionary "without capital punishment" language from 1897 was merged into the substantive murder offense section, as it was no longer needed for rape in light of the amendment to that statute's punishment provision as quoted in the text. H.R. REP. NO. 80-304 (1947) at A90 (Revisor's Notes); 18 U.S.C. § 1111 (1946 & Supp. V 1952). See also *infra* note 109.

life.”¹⁰⁹ Also in 1948, the Supreme Court ruled that the jury must be unanimous for death to be imposed under the 1897 statute.¹¹⁰

Meanwhile, federal executions in the twentieth century were relatively infrequent. From 1927 through Victor Feguer’s execution in 1963, only twenty-four federal executions were carried out.¹¹¹ Eight of these were for wartime espionage or sabotage, including the Rosenberg executions in 1953.¹¹² Feguer’s hanging was the only federal execution in the 1960s; the federal death penalty was virtually moribund.¹¹³ In 1967, a bill to abolish the death penalty for federal crimes was introduced in the Senate, although it went no further than hearings held in 1968.¹¹⁴

109. 18 U.S.C. § 2031 (1946 & Supp. V 1952). Interestingly, the 1947 Revisor’s Notes stated that the 1897 statute’s language was not included in the revised statute “since the rewritten punishment for rape removes the necessity for a qualified verdict.” H.R. REP. NO. 80-304, at A90. However, the 1897 statute had lodged the discretion not to impose death with the jury; the 1948 revised language had the effect of removing the discretion from the jury and lodging it with the sentencing judge. This change was not noted in the legislative history and appears to have been overlooked. But only a few years later, it became the dispositive basis for a (temporary) reversal of federal rape death sentences imposed on the Krull brothers for a national park rape in the 1950s. *See Krull v. United States*, 240 F.2d 122, 131-34 (5th Cir.), *cert. den.* 353 U.S. 915 (1957).

110. *Andres v. United States*, 333 U.S. 740, 749 (1948).

111. Death Penalty Information Center, *Executions of Federal Prisoners 1927-1998* (visited Nov. 12, 1998) <<http://www.essential.org/dpic/fedexec.html>>. In 1937, Congress amended the federal capital sentencing statute to allow any state-approved method of execution, as opposed to requiring hanging. *See Andres*, 333 U.S. at 745, n.6.

112. *See id.*; *see also supra* note 9. In addition to the Rosenbergs, six male prisoners were executed for sabotage in 1942, just two months after they were arrested and one month after they were tried by a Presidentially appointed military commission. *See id.*; *see also Ex Parte Quirin*, 317 U.S. 1 (1942). The speed of this extraordinary case is breathtaking and can be explained only by the dramatic wartime atmosphere of World War II. The prisoners entered the United States covertly in mid-June 1942 and by July 2 had been arrested and were subject to a special military trial proclaimed by President Roosevelt. *See id.* at 21-2. The case was argued to the Supreme Court over two days in July during a special session called by Chief Justice Stone; the case was decided the day after oral argument and the prisoners were executed a week later. *See id.* at 1, 5.

113. The same cannot be said, however, regarding State executions. From 1930 to 1962, over 3,700 executions were carried out. *See BEDAU* 1964, *supra* note 10, at 110, Table 3 (reprinting excerpts from U.S. Dep’t Of Justice, Bureau of Prisons, *National Prisoner Statistics* (No. 32, April 1963)). Subtracting the 26 federal executions during this period from the total of 3,812 executions leaves 3,786.

It should also be noted that the United States Army also executed 160 prisoners from 1930-1962, although 148 of these were carried out from 1942-1950 when wartime and post-war exigencies likely produced unusual pressures for military executions. *See BEDAU* 1964, *supra* note 10, at 107-08.

114. *See* S.1760; Hearings before the Subcommittee on Criminal Laws and Procedures, Sen. Jud. Comm., 90th Cong., 2d Sess. (1968).

Yet the roster of death-eligible federal crimes expanded from the reduced list of 1897. The Lindbergh Baby incident led Congress to provide a discretionary death penalty for violent kidnapping in 1932.¹¹⁵ In 1940, a federal offense of train-wrecking was enacted, with a possible sentence of death if the wreck resulted in the death of passengers.¹¹⁶ In 1956, death was made a potential penalty for the crimes of providing narcotics to a minor as well as espionage violations under the Atomic Energy Act.¹¹⁷ A rash of airplane bombings and hijackings in the late 1950s led Congress to define such conduct as capital crimes.¹¹⁸ Finally, even as significant challenges to capital punishment were pending in the Supreme Court, Congress added a death penalty for killings by explosives in 1970.¹¹⁹

As is apparent from this list, Congress authorized the death penalty for a number of offenses that, while serious, might not cause death. The decision in *Coker v. Georgia*¹²⁰ that death is an unconstitutionally "excessive penalty" for an offender (or at least an adult rapist) who "does not . . . take human life" lay years in the future.¹²¹ In fact, the two federal executions prior to Victor Feguer's, of the Krull brothers in 1957, were for non-lethal rape.¹²²

Meanwhile, concerns regarding the disparate imposition of the death penalty on racial minorities gained prominence in the Civil Rights era of the 1960s. In 1967, a Presidential Commission concluded that the "imposition of the death sentence and the exercise of [judicial and executive] dispensing power . . . follow discriminatory patterns."¹²³ Opponents of capital punishment linked arms with civil rights advocates to produce landmark capital punishment litigation. *Witherspoon v. Illinois*,¹²⁴ the 1968 decision that permitted persons with "general objections" to capital punishment never-

115. See 18 U.S.C. § 408(a) (1946).

116. See Act of June 8, 1940, ch. 286, 54 Stat. 255, 255-56 (current version at 18 U.S.C. § 1992) (1948) ("[w]recking trains" which "result[s] in . . . death").

117. See, ch. 629, 70 Stat. 571 (1956) (current version at 21 U.S.C. § 176(b) (*repealed* Oct. 27, 1970, Pub. L. 91-513, Title III, § 1101(a)(2), (9), 84 Stat. 1291, 1292)) (narcotics to a minor); ch. 1041, 70A Stat. 71 (Aug. 10, 195) (current version at 10 U.S.C. § 906).

118. See Federal Aviation Act of 1958, § 902d(i); BEDAU 1964, *supra* note 10, at 14.

119. See Pub. L. No. 91-452 (adding 18 U.S.C. § 844(d)), 84 Stat. 922 (1970).

120. 433 U.S. 584 (1977).

121. *Id.* at 598; see *infra* note 230.

122. See *Executions of Federal Prisoners 1927-1998*, *supra* note 111; *Krull*, 240 F.2d at 128.

123. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 143 (1967).

124. 391 U.S. 510, 522 (1968).

theless to serve on capital juries, and *McGautha v. California*,¹²⁵ the 1971 challenge to capital punishment which upheld unguided discretionary capital sentencing,¹²⁶ were briefed for the Supreme Court by both the NAACP Legal Defense and Educational Fund, Inc. and the American Friends Service Committee.¹²⁷ Finally, in 1972, concerns about racial discrimination expressly motivated a number of Justices to join in declaring unconstitutional all capital punishment statutes that provided unguided and unchecked discretion to jurors in deciding who should live or die in *Furman v. Georgia*.¹²⁸ Thus, the federal era of unguided but complete discretion begun by legislation in 1897 ended by judicial decision seventy-five years later.

D. Cases and Legislative Efforts from *Furman* through *Gregg* and *McCleskey*

Irrespective of execution rates, at the time *Furman*¹²⁹ and its companion cases were decided, the death penalty was authorized in forty-one states, in additional jurisdictions such as the District of Columbia, and in federal cases.¹³⁰ Two state statutes provided for mandatory death penalties upon conviction; the rest of the states and federal jurisdictions permitted the entirely open capital sentencing discretion found to violate the Eighth Amendment in *Furman*, and their statutes were thus invalidated.¹³¹

The epochal constitutional moment that was *Furman* needs little explanation. A majority of the Supreme Court Justices agreed to strike down open-discretion death penalty statutes as "cruel and unusual" in violation of the Eighth Amendment (via the Fourteenth). But the majority could not agree on a rationale. All nine Justices published separate opinions, and only two of them de-

125. 402 U.S. 183 (1971).

126. *McGuatha* was overruled a term later in *Furman* after the retirement and death of its author, Justice Harlan.

127. 391 U.S. at 510, 512, 522.

128. 408 U.S. at 240, 257, 306, 310, 314 (Douglas, J., Brennan, J., Stewart, J., White, J., Marshall, J., each concurring separately). As Professor Jeffries has described, statistics regarding the death penalty for rape from 1930-1965 "fairly screamed racial bias" and, in general, by 1972 "it seemed reasonably clear that the selection of those who should die for their crimes was based partly on race." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 407 (1994).

129. 408 U.S. 238 (1972).

130. *Id.* at 341 (Marshall, J., concurring).

131. *See id.* at 417 n.2 (Powell, J., dissenting).

clared that capital punishment was unconstitutional in all forms.¹³² "Untrammelled discretion" was condemned,¹³³ because it permitted "arbitrary" or, worse, improper "discrimination" to occur in the administration of capital punishment.¹³⁴ In the face of that decision, as Chief Justice Burger noted in his dissent, "if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past."¹³⁵

The immediate response to *Furman* was a short-lived movement toward statutes that eliminated all jury discretion by mandating imposition of a death penalty upon establishment of certain predicate facts.¹³⁶ Self-consciously reacting to *Furman*, Congress enacted a new "procedure in respect to the penalty for aircraft piracy" in 1974.¹³⁷ The House report noted that *Furman* had effectively invalidated all existing federal death penalties and, as a result, "federal prosecuting attorneys simply do not ask for the death penalty."¹³⁸

132. See *id.* at 305, 371 (Brennan, J., concurring, Marshall, J., concurring). Justice Douglas wrote only that "these discretionary statutes are unconstitutional." Justices Stewart and White similarly limited their views. *Id.* at 256, 306, 310. The other four members of the Court dissented in separate opinions.

133. 408 U.S. at 248 (Douglas, J., concurring).

134. *Id.* at 249-57 (Douglas, J., concurring) (discussing improper racial and economic discrimination); *id.* at 293-95 (Brennan, J., concurring) (discussing arbitrary infliction of death penalty, "little more than a lottery system"); *id.* at 309-10 (Stewart, J., concurring) (noting the "capriciously selected random handful" of executed prisoners; death is "wantonly and freakishly imposed"); *id.* at 313 (White, J., concurring) ("There is no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not"); 408 U.S. at 364-66 (Marshall, J., concurring) (discussing improper discrimination).

135. *Id.* at 397 (Burger, C.J., dissenting). See also *id.* at 400 (stating "significant statutory changes will have to be made").

136. See Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1152-53 & n.19 (1991) (noting that 22 states enacted some form of mandatory capital punishment statutes in response to *Furman*).

137. See Pub. L. 93-366 (93d Cong. 2d Sess.), 88 Stat. 409, 411-413, originally codified at 49 U.S.C. App. § 1472(i), 1473(c) (1983 ed.), repealed by Pub. L. 103-322, sec. 60003(b), 108 Stat. 1970 (1994). In proposing the 1974 air piracy provisions, the House Committee stated that it "believe[d] that the provisions . . . meet the requirements of the *Furman* case." H.R. REP. NO. 93-885 (Mar. 7, 1974), reprinted in 1974 U.S.C.A.N. 3975, 3981. See also 120 CONG. REC. 6522 (daily ed. March 13, 1974) (remarks of Rep. Dennis: Air Piracy bill is "an attempt to meet the standards of the court in *Furman* against Georgia. . . . [N]o one really knows whether that does it or not").

138. 1974 U.S.C.A.N. 3981. Some 15 years later Paul Kamenar argued that, in fact, *Furman* need not be interpreted as invalidating all federal death penalty provisions and that open discretion death penalty statutes could still be constitutionally applied so long as federal judges followed *Gregg*-like procedures. Paul Kamenar, *Death Penalty Legislation For Espionage and Other Federal Crimes is Unnecessary, It*

The Antihijacking Act embraced a new procedural structure, bearing many similarities to modern capital sentencing statutes: a bifurcated sentencing hearing, a list of mitigating factors, and a list of aggravating factors.¹³⁹ However, the statute ultimately made a death sentence mandatory: "the death penalty must be imposed if any one of the aggravating factors . . . is found . . . and none of the mitigating factors is found."¹⁴⁰ The House Report confirmed the mandatory nature of the air piracy provision, describing the bill as establishing "rational criteria for the mandatory imposition of the death penalty."¹⁴¹

The air piracy procedures were derived from more comprehensive legislation proposed to reform the federal criminal code, which contained generally-applicable capital punishment procedures.¹⁴² The DOJ supported these bills, which would have provided a similar structure for imposing the death penalty after conviction for a number of serious federal offenses;¹⁴³ however, this broader legislation was never enacted. Then, in a set of five capital cases in 1976, the Supreme Court struck down mandatory death penalty

Just Needs a Little Re-enforcement, 24 WAKE FOREST L. REV. 881, 898-99 (1989). Indeed, in 1988 the DOJ announced a revised view of its prior position that "[a]ll federal death penalty provisions were void" after Furman; the Department now argued that "certain narrow federal statutes . . . such as assassination of the President . . . might survive an Eighth Amendment challenge," so long as judges applying those statutes established constitutionally sufficient procedures for imposing the death penalty in each case. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.010 (Oct. 1, 1988); *but see*, 5 Op. Off. Legal Counsel 224, 226-29 (1981). According to Coyne and Entzerth, the Department twice sought death penalties under this revised view of Furman, but received an acquittal in one case and rejection by the court in the other. *See* Coyne & Entzerth, *supra* note 5, at 684; *see* United States v. Woolard, 981 F.2d 756, 759 (5th Cir. 1993) (affirming district court's rejection of the DOJ's new theory, and holding that federal courts cannot devise their own constitutionally sufficient death penalty procedures because "[t]he choices are for the Congress and it has not acted"). Passage of the comprehensive Federal Death Penalty Act in 1994 effectively mooted this line of argument.

139. 1974 U.S.C.C.A.N. 3981; 88 Stat. 411-12 (1974). This structure was derived from the American Law Institute's earlier Model Penal Code proposal.

140. 88 Stat. 412 (1974).

141. 1974 U.S.C.C.A.N. 3981; *accord* 120 CONG. REC. 6522 (daily ed., March 13, 1974) (interchange between Congressmen Dennis and Kuykendall) ("the death penalty is mandatory, as I understand it. MR. KUYKENDALL: Mr. Chairman, the gentleman is correct.").

142. *See* 120 CONG. REC. 6522 (daily ed. March 13, 1974) (remarks of Rep. Dennis) (air piracy provision "is an approach which is taken in general legislation pending before the Committee on the Judiciary which revises the entire U.S. Criminal Code").

143. H.R. 6028, 93rd Cong. (1973) (introduced by Congressman Gerald Ford on March 22, 1973); *see* 1974 U.S.C.C.A.N. 3981 (describing the bill); S.1401 (93rd Cong.), introduced by Senator Hruska on March 27, 1973; *see* 1974 U.S.C.C.A.N. 3999 (Conf. Rep. 93-1194 (July 12, 1974)).

statutes in *Woodson*¹⁴⁴ and *Roberts*,¹⁴⁵ while it upheld "guided discretion" statutory structures in *Gregg*,¹⁴⁶ *Proffitt*,¹⁴⁷ and *Jurek*.¹⁴⁸ Thus, although the air piracy provision remained on the books for twenty years, its mandatory character likely rendered its death penalty unconstitutional.¹⁴⁹

It is not entirely surprising that the immediate reaction of the DOJ and some state legislatures to *Furman* was to enact mandatory capital punishment procedures, for such statutes had been distinguished, with a hint of approval, in Justices White and Stewart's pivotal opinions in *Furman*¹⁵⁰ as well as in Justice Douglas's.¹⁵¹ Largely unnoticed, however, was Chief Justice Burger's statement in dissent that

[i]f this [mandatory death sentencing] is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition I could more easily be persuaded that mandatory sentences of death . . .

144. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

145. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

146. *Gregg v. Georgia*, 428 U.S. 153 (1976).

147. *Proffitt v. Florida*, 428 U.S. 242 (1976).

148. *Jurek v. Texas*, 428 U.S. 262 (1976).

149. The DOJ never conceded this, however. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.010 (Oct. 1, 1988) ("the Department's view [is] that [the air piracy] procedure is constitutional"); DEP'T OF JUSTICE MANUAL, *supra* note 12, § 9-63.134 (Prentice Hall 1993 supplement, p. 9-1311) (describing air piracy death penalty provision, "which the Department believes complies with . . . the *Furman* decision"). But the Department also apparently never sought to obtain a death penalty under the 1974 air piracy statute. The issue was mooted when the separate air piracy death penalty provision was expressly repealed in the 1994 FDPA.

150. See *Furman*, 408 U.S. at 306 (Stewart, J., concurring), 310 (White, J., concurring). Justices White and Stewart's separate opinions provided the necessary votes for striking down the death sentences in the 5-4 *Furman* decision. Justice White began his opinion by distinguishing mandatory sentencing schemes and noting that "I do not at all intimate that the death penalty is unconstitutional per se." 408 U.S. at 310-11. As for Justice Stewart, after noting the mandatory death sentence provisions in the federal military espionage statute (10 U.S.C. § 906) and various state statutes, he wrote that "[o]n that score I would only say that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment [It] serves an important purpose in promoting the stability of a society governed by law." *Id.* at 308. See also *Walton v. Arizona*, 497 U.S. 639, 662 (1990) (Scalia, J., concurring) (noting that "one might have supposed [after *Furman*] that curtailing or eliminating discretion in the sentencing of capital defendants was not only consistent with *Furman*, but positively required by it").

151. See *Furman*, 408 U.S. at 257 (Douglas, J., concurring) ("Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach."). Some of the immediate scholarly reaction to *Furman* also speculated that mandatory schemes would pass muster. See, e.g., Carol S. Vance, *The Death Penalty After Furman*, 48 NOTRE DAME LAW. 850, 853 (1973).

are so arbitrary and doctrinaire that they violate the Constitution.¹⁵²

Although the Chief Justice apparently changed his opinion regarding mandatory death penalties,¹⁵³ three of his Brethren adopted it wholeheartedly in 1976, deciding in *Woodson v. North Carolina* that "consideration of the character and record of the individual offender and the circumstances of the particular offense" is a "constitutionally indispensable part" of any capital punishment scheme.¹⁵⁴ Together with Justices Brennan and Marshall's condemnation of capital punishment in any form,¹⁵⁵ the *Woodson* plurality's view provided a majority to hold mandatory capital punishment schemes unconstitutional¹⁵⁶ — a majority that appears to endure, albeit with different members, to the present day.¹⁵⁷ The seemingly mandatory federal air piracy death penalty procedures enacted soon after *Furman* were thus never applied.

152. *Furman*, 408 U.S. at 401-02 (Burger, C.J., dissenting).

153. When the Court struck down mandatory death sentences in *Woodson* and a companion case, *Roberts v. Louisiana*, 428 U.S. 325, (1976), Chief Justice Burger merely wrote, "I dissent for the reasons set forth in my dissent in *Furman*." *Id.* at 337. He did not reconcile this with his *Furman* dissent that had appeared to condemn mandatory capital sentencing. See 408 U.S. at 401-02. See also *Woodson v. North Carolina*, 428 U.S. 280, 306 (1976) (Burger, C.J., joining Justice White's dissent without separate statement). The *Woodson* and *Roberts* plurality, however, did note Chief Justice Burger's apparently conflicting prior view. See 428 U.S. at 297 (citing Chief Justice Burger's *Furman* dissent).

154. 428 U.S. at 304 (opinion of Stewart, Powell and Stevens, JJ.). Professor Sundby has called this holding one part of the Court's "Holy Text for the eighth amendment." Sundby, *supra* note 136, at 1148. The Holy Text was, however, written by only a 5-4 margin, and Justice Scalia has now famously called it into question in his concurring opinion in *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., concurring). Sundby, *supra* note 136, at 1165.

Woodson also produced an interesting "switch" in positions between Justices White, who had voted to condemn capital punishment statutes in *Furman*, and Powell, who had voted to uphold those capital punishment statutes. In the four years between *Furman* and *Woodson*, Justice Douglas died but was replaced by Justice Stevens, who voted as Justice Douglas probably would have. Justice White, however, who had voted to uphold capital punishment in *McGuatha*, now voted again to uphold mandatory capital punishment statutes in *Woodson*. Thus Justice Powell, who had dissented in *Furman*, became the controlling vote in a narrow majority to strike down mandatory death penalty statutes and thereby endorsing individualized capital sentencing as a constitutional article of faith. See JEFFRIES, *supra* note 128, at 422-27 (describing the episode).

155. See 428 U.S. at 305-06 (citing their dissents in *Gregg*, at 227, 231).

156. It must be noted, however, that the *Woodson* plurality expressly reserved judgment on mandatory death statutes applicable to prisoners serving life sentences who commit intentional murder. 428 U.S. at 292-93 n.25. Ten years later, the Court declared just such a statute unconstitutional in *Sumner v. Shuman*, 483 U.S. 66, 78, 85 (1986).

157. See *id.*; *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

Meanwhile, general legislation to revise federal death procedures was introduced repeatedly between 1972 and 1988 (when the CCE death penalty procedures were enacted).¹⁵⁸ Nine months after *Furman*, bipartisan legislation backed by the Justice Department was introduced in the Senate "to provide constitutional procedures and criteria for imposition of the death penalty for most" federal offenses that then authorized the penalty.¹⁵⁹ Hearings were held and the Senate passed the bill, but the House did not act.¹⁶⁰ Instead, the House enacted the more narrow air piracy legislation. This was likely a direct reaction to a recent district court decision that had specifically declared the air piracy death penalty unconstitutional in light of *Furman*.¹⁶¹ One might also speculate that the narrower air piracy legislation was enacted as a "trial balloon" in light of further anticipated challenges to capital punishment.¹⁶²

In the next Congress (1975-76), a number of death penalty bills were introduced, but legislative action was deferred until the *Gregg* group of cases was decided by the Supreme Court in 1976.¹⁶³ Then, during the ten years following *Gregg*, general federal death penalty procedure bills were repeatedly introduced, hearings were held, and congressional action was occasionally taken, but no legislation was enacted.¹⁶⁴ As one proponent noted in 1985, "[t]he U.S. Congress has never repealed the death penalty It was simply held in limbo . . . after *Furman*."¹⁶⁵

Possible explanations for the lack of completed federal legislative action are various. While individual state legislatures were

158. See *infra* notes 186-205 (discussing the CCE procedures); see generally, Tobolowsky, *supra* note 10, at 48-50.

159. See S.REP. NO. 99-282, at 2 (1986). Republican Senator Hruska and Democratic Senator McClellan introduced S.1401 on March 27, 1973. Their bill would also have eliminated the death penalty in cases of rape or kidnapping if death did not result. *Id.* at 2 & n.5.

160. *Id.* at 3; 120 CONG. REC. 6757 (daily ed. March 13, 1974) (Senate passes bill S. 1401, by a vote of 54-33).

161. See *United States v. Bohle*, 346 F. Supp. 577 (N.D.N.Y. 1972).

162. See 120 CONG. REC. 6522 (daily ed. March 13, 1974) (Rep. Dennis: "Now, the gentleman is lifting that out of the [general legislation] . . . and is trying to do it for air piracy in this one particular case. That is the situation, is it not? Mr. Kuykendall: Mr. Chairman, the gentleman is exactly correct.").

163. See S.REP. NO. 99-282, at 3 (1986).

164. See *id.* Hearings were held in 1977, 1981, 1983, and 1985. *Id.* at 3-4 & nn.15, 21, 26.

165. *Hearings on H.R. 2837* (Nov. 7, 1985) at 4 (statement of Gekas (R-Pa.)); see also *supra* note 5 (noting description of the federal death penalty provisions left in place after *Furman* as "zombie statutes").

able to reach consensus as to the death penalty — some for and some against — such local agreement led directly to national political deadlock in Congress. This political deadlock seems unsurprising in a federalist system governed by congressional delegations from states that fundamentally disagree about the death penalty.¹⁶⁶ Moreover, the Supreme Court was, with relative frequency, issuing opinions that adjusted constitutional requirements for imposing the death penalty.¹⁶⁷ Proposed Federal legislation repeatedly had to be revised to accommodate such decisions,¹⁶⁸ and opponents could argue, with some justification, that Congress should await controversial decisions still in the pipeline before acting.¹⁶⁹ Finally, serious concerns continued to be raised about “racial and economic discrimination in the imposition of th[e death] penalty.”¹⁷⁰ *Mc-*

166. Interestingly, while the Senate thrice passed general death penalty procedure bills, in 1974, 1984 and 1986, the House consistently declined to act on the legislation. *See S. REP. NO. 99-282* at 3, 4. This possibly could reflect the more locally politicized character of that body. *See also infra* note 169 (noting Rep. Conyers’ (D-Mich.) power in the House).

167. “Tinker[ing] with the machinery of death,” in Justice Blackmun’s words. *Calins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

168. *See, e.g.*, H.R. REP. NO. 99-282, at 3 (“[i]n 1977, a bill (S. 1382), that reflected the latest decisions by the Supreme Court, was introduced. . . .”); *Hearings on S. 239 Before the Senate Comm. on the Judiciary*, 99th Cong. 4 (1985) (statement of Sen. DeConcini (R-N.M.)).

169. *See, e.g.*, *Hearings on H.R. 2837 and H.R. 343*, 99th Cong. 1 (1985). For example, in the House, long-time Congressman John Conyers, Jr. (D-Mich.) was the Chair of the House Judiciary Committee’s Subcommittee on Criminal Justice, to which death penalty legislation was referred. Chairman Conyers made it clear that he “believe[d] that the death penalty is cruel and unusual” in all circumstances. *Id.* In light of the congressional subcommittee system for considering legislation, the opposition of the Chairman was plainly a serious obstacle to action in the House. *See* Nelson W. Polsby, *The Making of the Modern Congress* in KNOWLEDGE, POWER AND THE CONGRESS 83-84 (William H. Robinson & Clay H. Wellborn eds., 1991); *see generally* CHANGING CONGRESS: THE COMMITTEE SYSTEM (Norman J. Ornstein ed., 1974).

170. *Hearings on H.R. 2837 and H.R. 343*, 99th Cong. 2 (1985) (statement of Chairman Conyers). Chairman Conyers also noted apparent “gender discrimination” in imposition of the death penalty. *Id.* at 3. In fact, only two of the 34 federal executions from 1927 to the present were of women. *See* Death Penalty Information Center, *Federal Death Penalty* (last modified Dec. 16, 1998) <<http://www.essential.org/dpic/feddp.html>>. Similarly, of 3,829 State executions between 1930 and 1980, only 32 were of women. *See* BEDAU 1982, *supra* note 88 at 58, 62, Tables 2-3-2 & 2-3-3. Finally, none of the 20 federal prisoners currently on death row are female, and at the end of 1996, only 44 of the 3,335 prisoners on death row in the United States were female. *See* CAPITAL PUNISHMENT 1997, *supra* note 45, at 6, 7. *See generally* Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN’S L.J. 283 (1996); Thad Rueter, *Why Women Aren’t Executed: Gender Bias and the Death Penalty*, 23 HUMAN RIGHTS 10 (Fall 1996); Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CINN. L. REV. 845 (1990); Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the*

Cleskey v. Kemp,¹⁷¹ which considered disturbing statistical evidence of such discrimination but rejected it as a basis for a constitutional challenge, was not decided until 1987.¹⁷² Prior to *McCleskey*, legislative concern about racial disparity in administering the death penalty clearly contributed to the legislative deadlock on the issue.¹⁷³

Nevertheless, in 1986, Congress did amend a lone federal statute, 18 U.S.C. § 1512, to add a possible death penalty for "killing witnesses."¹⁷⁴ Entitled "Minor and Technical Amendments," the 1986 bill had originally proposed only to amend § 1512 to address a recent decision that made killing a witness not prosecutable as the crime of "witness intimidation."¹⁷⁵ As enacted, however, the punishment section of the amendment stated that "in the case of a killing" the defendant would be punished under 18 U.S.C. § 1111 (the general federal murder statute).¹⁷⁶ Although the Congressional reports did not note it, the cross-referenced § 1111 still contained the pre-*Furman* open discretion death penalty possibility.¹⁷⁷ Because the expressed purpose of the amendment was not to create a new death penalty, and because the penalty would be unconstitutional under *Furman* to the same extent that § 1111 was, this change either escaped all Congressional notice or was viewed as inconsequential by opponents of capital punishment.¹⁷⁸

Outer Limits of the Eighth Amendment and Articulated Theories of Justice, 75 TEX. L. REV. 1413, 1415 n.16 (1997) (collecting authorities).

171. 481 U.S. 279 (1987).

172. 481 U.S. at 282 (decided by a 5-4 majority).

173. See, e.g., S. REP. NO. 99-282, at 51 (1986) (minority views of Senators Metzenbaum, Kennedy and Simon) (describing the statistical evidence of racial disparity as "another sinister aspect of capital punishment").

174. Pub. L. No. 99-646, § 61, 100 Stat. 3592, 3614 (1986).

175. See H.R. REP. NO. 99-797 (Aug. 15, 1986) at 30 (Sec. 44 of the bill designed to counter *United States v. Dawlett*, 787 F.2d 771 (1st Cir. 1998)).

176. 100 Stat. 3614.

177. See 18 U.S.C. § 1111 (1986); H.R. REP. NO. 99-797, at 30 (no mention of death penalty); S. REP. NO. 99-278 (1986) (same).

178. See H.R. REP. NO. 99-797, at 30 (no mention of death penalty); S. REP. NO. 99-278 (1986) (same). In addition to the 1974 air piracy death penalty provisions and the 1986 witness-killing provision, Congress enacted one other death penalty provision between *Furman* and 1988. In a 1985 amendment attached to the Department of Defense Authorization Act of 1986, Congress amended the Uniform Military Justice Act to establish "weighing" procedures for court martials considering the death penalty for espionage. See Pub. L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (codified at 10 U.S.C. § 906(a)). In an effort to comply with *Gregg* and its progeny, the new provision specified four aggravating factors, granted defendants "broad latitude to present matters in extenuation and mitigation," and directed that the death penalty may not be imposed unless the court martial members unanimously found that the aggravating factors "substantially outweigh" any mitigating circumstances. 10 U.S.C.

The *McCleskey* decision in 1987 was a watershed for death penalty litigation. Based upon a foundation of long-standing concern regarding racial disparity in the administration of capital punishment, a powerful group of death penalty opponents acting as counsel and amici attempted to prove unconstitutional race discrimination by introducing an elaborate statistical study.¹⁷⁹ Professors Baldus, Pulaski and Woodworth studied over 2,000 capital murder cases in Georgia and concluded, after redacting thirty-nine "nonracial variables" from their analysis, that race nevertheless played a statistically significant role in determining which defendants received the death penalty.¹⁸⁰ While "assum[ing] the study is valid statistically," the five-Justice majority of the Court in *McCleskey* seemed to hold that, in the capital sentencing context, statistics alone are not sufficient to establish the element of intentional discrimination required by constitutional Equal Protection cases.¹⁸¹ The Court also disagreed that the statistical evidence proffered made out a valid Eighth Amendment claim.¹⁸² Despite the close margin and strong objections to the *McCleskey* holdings,¹⁸³ once the case was decided, a major constitutional argument by federal death penalty opponents was no longer available.¹⁸⁴

§ 906(a) (b) & (c). The Supreme Court has suggested that military capital punishment may be treated differently for constitutional purposes, and the topic is not further discussed here. See *infra* note 233.

179. See *McCleskey v. Kemp*, 481 U.S. 279, 282 & n.* (1987) (listing counsel).

180. *Id.* at 287. Specifically, Baldus and his colleagues concluded that black defendants who killed white victims were over four times more likely to receive the death penalty than would be the case if the victims were black. *Id.* In addition, blacks who killed white victims were far more likely to be charged with a capital offense than were whites who killed black or white victims, as well as blacks who killed blacks (70% versus 32%, 19%, and 15% respectively). *Id.* See generally BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990) (detailing the results of two massive studies, and evaluating *McCleskey* as well as other death penalty precedents). Thus the Baldus study showed a clear "race of victim" influence on capital cases, and a more equivocal "race of defendant" influence. Accord, U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 6 (Feb. 1990) [hereinafter 1990 GAO REPORT].

181. *McCleskey*, 481 U.S. at 292-97. The *McCleskey* court may have left a small door open for statistical studies that provide "far stronger proof" than did the Baldus study, *id.* at 296, but it is difficult to envision such proof coming purely from statistics. See also *United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("clear evidence" is required to demonstrate an equal protection violation by prosecutors).

182. See *id.* at 308-13; *Id.* at 320 (Brennan, J., dissenting).

183. The case was decided by only one vote, with Justices Brennan, Marshall, Blackmun and Stevens dissenting. See 481 U.S. at 320, 345, 366; see also *infra* notes 607-610 and accompanying text (noting some of the scholarly criticism of *McCleskey*).

184. Of course, concerns regarding racial disparity did not disappear after *McCleskey*. See, e.g., 134 CONG. REC. 13,978 (1988) (statement of Sen. Kennedy (D-Mass.)) (stating that *McCleskey* made statistical evidence of racial disparities "constitutionally

E. The 1988 CCE Death Penalty Statute

In 1988, the repeated efforts to enact constitutional federal death penalty procedures culminated in the successful addition of a death penalty and implementing procedures to the federal "Continuing Criminal Enterprise" ("CCE") offense.¹⁸⁵ While the legislative history for the CCE death penalty statute in the 1987-88 Congress was minimal,¹⁸⁶ procedural death penalty legislation had received extensive legislative review by prior Congresses.

Similar to the air piracy death penalty statute of 1974, the CCE legislation was limited to a single offense, which itself is a relatively complicated, and consequently infrequently used, federal charge.¹⁸⁷ Nevertheless, the 1988 statutory procedures were responsive to the requirements imposed by Supreme Court precedent, and the CCE statute provided a template for future federal death penalty legislation. Among other things, the CCE death penalty procedures provide for a bifurcated guilty/penalty proceeding,¹⁸⁸ limit eligibility for the death penalty to offenders who "intentionally kill[] or . . . cause[] [an] intentional killing,"¹⁸⁹ narrow the class of eligible of-

insufficient" but "not morally insufficient"); 1990 GAO REPORT, *supra* note 180. But the Supreme Court's decision reduced the persuasive and rhetorical force of such concerns in the minds of some congressmen and (to the extent the Supreme Court's decisions are popularly comprehended) their local electorates. See 134 CONG. REC. 13,988 (1988) (statement of Sen. Hatch (R-Utah)) (stating that *McCleskey* is the authoritative judgment of the Supreme Court "that racial animus will not be allowed to taint the criminal justice system").

185. Continuing Criminal Enterprise, Pub. L. No. 100-690, § 7001(a), 102 Stat. 4181, 4387 (codified at 21 U.S.C. § 848(e)-(r) (1988)). Although it is unknown whether the Supreme Court's resolution of the racial disparity issues in *McCleskey* a year earlier in fact helped break the legislative logjam, it seems likely that the case was a factor.

186. See *United States v. Pretlow*, 779 F. Supp. 758, 764 n.4 (D.N.J. 1991) (statute was enacted without committee review and its debate consisted only of "a handful of debates on the Senate floor"); 134 CONG. REC. 13,976 (1988).

187. The substantive CCE offense requires proof of many elements, including a "continuing series of violations" of federal narcotics laws, committed by the defendant "in concert with five or more other persons," with whom the defendant "occupies a position of . . . management," and from which the defendant obtains "substantial income or resources." 21 U.S.C. § 848(c) (1988). Its complicated structure continues to provide fodder for Courts of Appeal disagreements requiring Supreme Court attention. See *Richardson v. United States*, 130 F.3d 765, *cert. granted*, 119 S. Ct. 39 (Oct. 5, 1998) (granting certiorari on question arising out of "series of violations" element).

188. See 21 U.S.C. § 848(i)(1) (1988); see also *McCleskey*, 481 U.S. at 302; *Gregg*, 428 U.S. at 155.

189. 21 U.S.C. § 848(e)(1) (1988). The statute further specifies four death-qualifying *mens rea* states as possible aggravating factors, ranging from "intentionally killed" to "intentionally engaged in conduct which the defendant knew would create a grave risk of death," a form of recklessness. 21 U.S.C. § 848(n)(1) (1988). See *Tison v.*

fenders to those against whom some additional "aggravating" factor is unanimously found,¹⁹⁰ require the jury to consider "mitigating" factors,¹⁹¹ permit non-unanimous consideration of such mitigating factors,¹⁹² make it express that "regardless of . . . findings with respect to aggravating and mitigating factors," the jury is "never required to impose a death sentence,"¹⁹³ and direct that a death sentence "shall not be carried out" upon the mentally retarded, the insane, or persons who are under eighteen when the crime is committed.¹⁹⁴

The 1988 CCE legislation introduced additional capital punishment protective measures not required by any Supreme Court case. For example, the statute requires reasonable advance notice from the government of its intent to seek the death penalty and of the aggravating factors it will seek to prove.¹⁹⁵ It also provides that no prison employee or agent may be required to attend or "participate in" any execution.¹⁹⁶ Moreover, responding to *McCleskey* concerns, the statute also requires trial judges to explicitly instruct the jury that it

shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what [such characteristics] . . . of the defendant, or the victim, may be.¹⁹⁷

Arizona, 481 U.S. 137 (1987). To impose the death penalty, however, a CCE jury must find not only one of the (n)(1) *mens rea* aggravators, but also an additional aggravator under § 848(n)(2)-(12). 21 U.S.C. § 848(k) (1994).

190. 21 U.S.C. § 848(k) (1994); see *Gregg*, 428 U.S. at 163.

191. 21 U.S.C. § 848(m) (1994); see *Lockett v. Ohio*, 438 U.S. 586 (1978).

192. 21 U.S.C. § 848(k) (1994); see *Mills v. Maryland*, 486 U.S. 367, 382-383 (1988).

193. 21 U.S.C. § 848(k) (1994); see *Gregg*, 428 U.S. at 199 (noting that there is no prior case which suggests that the decision to afford an individual mercy violates the Constitution); *Woodson*, 428 U.S. 280 (holding that mandatory capital punishment statutes unconstitutional). In addition, the 1988 statute requires that "the jury shall be so instructed." 21 U.S.C. § 848(k) (1988).

194. 21 U.S.C. § 848(l) (1994); see *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (discussing minors under 16); *Ford v. Wainwright*, 477 U.S. 399 (1986) (discussing the insane).

195. 21 U.S.C. § 848(h) (1994).

196. 21 U.S.C. § 848(r).

197. 21 U.S.C. § 848(o)(1). Although this provision was enacted after *McCleskey*, similar language had been proposed in earlier bills. See S.REP. NO. 99-282, at 24 (1986) (stating that the proposed S.239 contained such a provision regarding improper consideration of such characteristics of the defendant; the Committee noted that "[o]bviously" such characteristics "of the victim" would also constitute inappropriate bases for capital sentencing).

Finally, the 1988 CCE legislation mandated, for the first time in the federal arena, the appointment of competent lawyers for federal capital appeals as well as for “any post-conviction [habeas] proceeding . . . seeking to vacate or set aside a death sentence,” and the provision of “investigative, expert, or other reasonably necessary services” for the representation of the defendant.¹⁹⁸

The first federal death penalty imposed under the CCE “drug kingpin” procedures — indeed, the first federal death penalty imposed in the present generation — fell upon David Ronald Chandler.¹⁹⁹ According to the evidence at trial, in the course of running a large-scale, multistate marijuana production and distribution operation, Chandler arranged for one of his dealers to execute a snitch.²⁰⁰ After convicting Chandler of the CCE offense, the jury went on to find that although he had not committed the murder himself, he had intentionally caused the death and had procured it by promise of payment, both explicit aggravating factors in the CCE statute.²⁰¹ The jury unanimously recommended the death

Directly in response to *McCleskey*, the 1988 CCE provisions also required the Comptroller General to study and report on state death penalty procedures and their possible racial-disparity effects. See 21 U.S.C. § 848(o)(2). This report was issued in February 1990, when the U.S. General Accounting Office reported that its review of 28 pre-existing studies on the topic found “a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.” 1990 GAO REPORT, *supra* note 180, at 5.

198. 21 U.S.C. § 848(q)(4). Appointment of counsel “learned in the law” had of course been required for federal trials since 1790. See *supra* note 49. The CCE statute broadened this requirement in two significant ways: it now applies to appeals and post-conviction habeas proceedings; and appointed counsel now must be not only “learned” but specifically members of the Bar for at least five years and experienced for three years in handling felony criminal cases. 21 U.S.C. § 848(q)(5) (1994).

199. See *Chandler v. United States*, 996 F.2d 1073, 1079 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994), *habeas appeal pending*, No. 97-6365 (orally argued on October 28, 1998).

200. *Chandler*, 996 F.2d at 1080-81. The trial testimony was that Chandler offered \$500 to his dealer, Charles Ray Jarrell Sr., to kill Marlin Shuler. Jarrell then shot Shuler dead while engaging in “target practice” with Shuler. Chandler helped Jarrell bury Shuler’s body, but then reneged on his promise to pay Jarrell. Jarrell confessed and agreed to testify for the government, and the foregoing account is based on his testimony. *Id.* at 1080-82. In 1996, however, Jarrell recanted his testimony regarding acting on Chandler’s behalf, and offered personal reasons for killing Shuler, which if true would eliminate Chandler’s responsibility for the intentional killing. This recantation provides one basis for Chandler’s recent argument in his habeas appeal. See *Alabamian on Death Row Could Win a New Trial*, N.Y. TIMES, Oct. 29, 1998, at A17; Benjamin Wittes, *Executions and the Innocent*, WASH. POST, Dec. 29, 1998, at A15.

201. See 21 U.S.C. § 848(n)(1), (6) (1994).

penalty, which the district judge, lacking discretion once the jury recommends death, then imposed.²⁰²

Interestingly, of the first four cases in which the Justice Department sought a CCE death penalty, only *Chandler* resulted in a death penalty verdict.²⁰³ The Eleventh Circuit affirmed Chandler's death sentence in 1993.²⁰⁴ By 1994, the CCE death penalty procedures had been upheld consistently against multiple constitutional attacks.²⁰⁵

202. See *Chandler*, 996 F.2d at 1082 ("Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death."). See 21 U.S.C. §848(l) (1994). See Robinson, *supra* note 6, at 1506-08, 1526 (comparing the Chandler death penalty to another, more aggravated CCE case in which the jury rejected the death penalty, and arguing for introduction of a federal "override" provision that would allow a judge to override a capital jury's recommendation).

203. See *United States v. Pitera*, 795 F. Supp. 546, 550 n. 1 (E.D.N.Y. 1992) (reporting that the juries in *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990), and *United States v. Villarreal*, 963 F.2d 725 (5th Cir. year) had declined to recommend death, and that the defendant in *United States v. Pretlow*, 779 F. Supp. 758 (D.N.J. 1991), committed suicide before verdict). *Cooper* was reportedly "the first case in the country" in which the United States sought a death penalty under the 1988 CCE provisions. 754 F.Supp. at 620.

204. *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993). The *Chandler* Court noted that the CCE statute did not provide specifically for a method of execution (nor did any other federal statute at the time), but rejected this as a constitutional impediment to imposing the death penalty. See *id.* at 1095-96; *accord*, *Pitera*, 795 F. Supp. at 571 (relying on *Dobbert v. Florida*, 432 U.S. 282 (1977), which held that changes in death sentencing procedures do not violate the ex post facto clause). The *Chandler* Court held that Congress could lawfully enact a method of execution in the future. See 996 F.2d at 1095-96. The *Chandler* Court also rejected the argument that not knowing "when or how" one will be executed violates the Eighth Amendment. See *id.* at 1096.

Interestingly, the 1986 bill that ultimately evolved into the 1994 FDPA had included an "implementation" section, similar to what became 18 U.S.C. § 3596 in the 1994 FDPA. See S. REP. 99-282, p. 25. It is unclear why this section of the 1986 proposal was not included in the 1988 CCE legislation.

205. See *Chandler*, 996 F.2d at 1084-96; *Pitera*, 795 F. Supp. at 552-67; *Pretlow*, 779 F. Supp. at 761-76; *Whiting*, 771 F. Supp. at 477; *Cooper*, 754 F. Supp. at 621-27.

The CCE provisions have also been consistently upheld against attacks since 1994. See *United States v. Tipton*, 90 F.3d 861, 895-901 (4th Cir. 1994), *cert. denied*, 117 S. Ct. 2414 (1997); *United States v. McCullah*, 76 F.3d 1087, 1106-11 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997); *United States v. Flores*, 63 F.3d 1342, 1367 (5th Cir. 1995); *United States v. Walker*, 910 F.Supp. 837, 844-60 (N.D.N.Y. 1995). In *McCullah*, the court reversed the CCE death sentence, ruling that "duplicative" aggravating factors had improperly been submitted to the jury. 76 F.3d at 1111-12. This argument, however, was an "as applied" argument and the court rejected facial attacks on the CCE statute itself. *Id.* at 1110. See also *United States v. Bradley*, 880 F. Supp. 271, 279-292 (M.D. Pa. 1994) (granting discovery as to alleged racial bias in federal death penalty selection, while rejecting constitutional attacks on the statute).

F. The 1994 Federal Death Penalty Act ("FDPA")

1. Political Origins of the FDPA

By the fall of 1994, the enactment of generally applicable federal death penalty procedures was all but inevitable. Congress had studied the issues for two decades. Thirty-six states had reinstituted capital punishment since *Furman*, and executions by states were being carried out with some regularity.²⁰⁶ Public support for some form of the death penalty remained unwaveringly high.²⁰⁷ The Supreme Court had fine-tuned many constitutional guidelines for imposing the death penalty, and had made it clear that within the general bounds of "guided discretion," very different capital punishment regimes could pass constitutional muster.²⁰⁸

Meanwhile, in *McCleskey* the Court had rejected evidence of statistical race disparity in imposition of the death penalty as a basis for striking death penalty legislation.²⁰⁹ Since 1988, lower federal courts had consistently upheld the CCE death penalty procedures and, in 1994, the U.S. Supreme Court denied certiorari in its first CCE death sentence case.²¹⁰ Little more could be offered as a principled ground for opposing more general federal legislation, other than moral opposition to capital punishment. While

206. See CAPITAL PUNISHMENT 1993, *supra* note 5. The states carried out 38 executions in 1993, for a total of 226 since *Gregg* had been decided. *Id.* at 1-2.

207. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 181, Table 2.68 (1995) [hereinafter BUREAU OF JUSTICE STATISTICS 1995] (reporting that 79 percent of Americans say they support death penalty for murderers). But see Sean Durkan et al., *Capital punishment confuses Canadians*, EDMONTON SUN, Jan. 20, 1999, at 10 (reporting that in Canada, a poll shows that 75% of Canadians support "capital punishment" but only 48% say they support it if the phrase is changed to "death penalty"); William J. Bowers, et al. *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AMER. J. CRIM. L. 77, 142 (1994) ("The data suggest that public support for capital punishment is an illusion that has become a self-perpetuating political myth.")

208. See *Morgan v. Illinois*, 504 U.S. 719, 725-26 (1992) (citing *Spaziano v. Florida*, 468 U.S. 447, 464 (1988)). See, e.g., *Pulley v. Harris*, 465 U.S. 37, 45 (1984) (holding that the absence of "proportionality review" on appeal does not invalidate statute because "each distinct system must be examined on an individual basis") (quoting *Gregg*, 428 U.S. at 195); *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (examining Louisiana's death penalty scheme individually).

209. See *McCleskey*, 481 U.S. at 297.

210. See *supra* note 205 for cases. The Supreme Court denied certiorari in *Chandler* on June 20, 1994. See 512 U.S. 1227, 1227 (1994). The general federal death penalty procedures were finally voted on in August 1994 and became law on September 13, 1994. See 1994 U.S.C.C.A.N. 1801; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1800 (1994).

some members of Congress eloquently held fast to this ground, they comprised substantially less than a majority.²¹¹

Moreover, in 1992, a Democratic President, who supported capital punishment and had authorized executions while governor,²¹² had been elected. Thus, the traditional party of opposition to federal capital punishment had no White House leadership. In fact, in August 1993, President Clinton and the Democratic Senate Judiciary Committee Chair announced a comprehensive "anti-crime initiative," which included "expansion of the federal death penalty."²¹³ When Janet Reno was confirmed in March 1994, she stated that she "looked forward to . . . developing death penalty statutes" with Congress.²¹⁴ Overall, the President's DOJ consistently supported new federal death penalty legislation.²¹⁵

In addition, since at least 1991, respected Democratic members of the House had been introducing broad death penalty legislation.²¹⁶ When the House Judiciary Committee first attempted to write a crime bill that did not address the federal death penalty in 1993, the Republican minority strongly protested.²¹⁷ By March 1994, the Committee reported two bills, H.R. 4032 and 4035, that ultimately became (with a few amendments) the Federal Death Penalty Act ("FDPA") of 1994.²¹⁸ Although the legislation would

211. See, e.g., 140 CONG. REC. S16292 (Nov. 13, 1993) (Sen. Hatfield, noting "immorality" of capital punishment; "travesty of justice" and "just plain wrong"). The final vote that day, however, on the Senate crime bill containing the death penalty provisions, was 95-4. See *id.* at S16301.

212. See Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 118.

213. See *Crime Prevention and Criminal Justice Reform Act: Hearings on H.R. 3315 Before the Subcomm. On Crime and Criminal Justice of the House Comm. On the Judiciary*, 1994 WL 214216 (F.D.C.H. 1995) (statement of Jo Ann Harris, Deputy Attorney General).

214. Hearings on the Nomination of Janet Reno to be Attorney General of the United States, S. Hrg. 103-513, (Judic. Comm., March 9 & 10, 1993) at 100 [hereinafter *RENO CONFIRMATION HEARINGS*].

215. See, e.g., *Taking Back Our Streets Act of 1995: Hearings on H.R. 3 Before the Subcomm. On Crime of the House Comm. On the Judiciary*, 1995 WL 18436 (F.D.C.H. 1995); Letter from Andrew Fois, Assistant Attorney General, U.S. Dep't of Justice, to Bill McCollum, Chairman, *Subcomm. On Crime and Criminal Justice of the House Comm. On the Judiciary* (Sept. 28, 1995) (reprinted in 1995 WL 579349 (F.D.C.H. 1995) (supporting new legislation regarding implementation of the federal death penalty).

216. See, e.g., 137 CONG. REC. E438-01 (Feb. 6, 1991) (Rep. Hughes introduces bill to make "the death penalty . . . constitutionally available for over 20 Federal crimes").

217. See H.R. REP. NO. 103-324 (1993), at 26 (11 members note that "restoration of the federal death penalty" is needed if "comprehensive reform" is to be had), reprinted in 1994 U.S.C.C.A.N. 1802, 1815.

218. See "Death Penalty for Certain Crimes," H.R. REP. NO. 103-466 (1994); "To Establish Constitutional Procedures for the Imposition of the Death Penalty," H.R.

implement the federal death penalty for the first time in thirty years, it was perceived as moderate Democratic death penalty legislation. In fact, thirteen Republican members of the House Judiciary Committee dissented on the ground that the new federal death penalty procedures would so favor capital defendants that they would "make it extremely difficult, if not impossible, to enforce a federal death penalty."²¹⁹

Indeed, as enacted, the FDPA plainly was a compromise between moderate Democrats and Republicans. In previous Congresses, the Senate had passed new federal death penalty legislation, but the House had consistently declined to act on it. This time, the situation in the House was different. When the crime bill came to the floor of the House in April 1994, some members of both parties opposed it because it did not go far enough, in *either* direction, regarding the death penalty.²²⁰ Nevertheless, moderate Democrats with misgivings about the death penalty still voted in favor of the bill.²²¹

Meanwhile, the Senate had overwhelmingly passed its own version of the bill, as it had in years past.²²² In an August 1994 conference, the Racial Justice Act provisions passed by the House were eliminated on threat of a Republican filibuster in the Senate, and a few other provisions were the object of bipartisan compromise.²²³ A bipartisan scenario involving members of Congress normally op-

REP. NO. 103-467 (1994). A favorable report of the "Racial Justice Act," H.R. REP. NO. 4017, was also a part of the House Judiciary Committee's package at this time. See H.R. REP. NO. 103-458 (1994). That Act, which ultimately was not enacted, would have permitted statistics to make out a *prima facie* case of race discrimination, thereby requiring prosecutors to demonstrate a non race-related basis for seeking a death sentence. See Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 520 (1995).

219. See H.R. REP. NO. 103-467, at 21 (dissenting views). This same group also dissented from the Committee's favorable report on the Racial Justice Act. See H.R. REP. NO. 103-458, at 14.

220. See, e.g. 140 CONG. REC. H2601 (daily ed. April 21, 1994) (Rep. Collins (D-Mich.) opposes the bill because it includes death penalty and does not sufficiently address racial concerns); *id.* at 2602-04 (Reps. Dolittle (R-Cal.) and Dornan (R-Cal.) oppose bill because it includes the Racial Justice Act).

221. Representative of this position are the remarks of Congressman Bruce Vento (D-Minn.), who voted in favor of the Bill while stating that "the death penalty is . . . an admission of frustration not a solution." 140 CONG. REC. at H2604.

222. 140 CONG. REC. S16302 (daily ed. Nov. 19, 1993) (95-4); see *supra* note 166 (noting prior Senate approvals of death penalty legislation); see also 140 CONG. REC. S12600 (daily ed. Aug. 25, 1994) (Senate passes final bill 61-38).

223. See H.R. CONF. REP. NO. 103-711 (1994) at 388 ("Title VI - Death Penalty") reprinted in 1994 U.S.C.C.A.N. 1856; Chemerinsky, *supra* note 218, at 520. See *supra* note 218 (describing the Racial Justice Act).

posed to capital punishment again played out in the House on the final Conference Report.²²⁴ In both April and August 1994, the legislation with the new federal death penalty provisions passed the House with significant opposition from both sides of the aisle, somewhat surprising for a crime bill in an election year.²²⁵ On September 13, 1994, the FDPA became law.²²⁶

2. Summary of the FDPA

Before delving into the detail of the new federal death penalty procedures, a brief summary of the entire FDPA may be helpful. The Act consisted of twenty-six separate Sections, combining the procedural provisions and the substantive offense provisions of the two separate House bills.²²⁷

Section 60001 simply provided the "Federal Death Penalty Act" title. Section 60002 then detailed the new "constitutional procedures for the imposition of the sentence of death."²²⁸ In addition, on a substantive level Section 60002 authorized imposition of a death penalty in two new situations, both involving non-homicide events: very large-scale drug dealing and major CCE offenders ("super drug kingpins") who simply "attempt" to kill.²²⁹ The sig-

224. See, e.g., 140 CONG. REC. H8956 (daily ed. Aug. 21, 1994) (Rep. Shays (D-Conn.): "I do not believe in the death penalty but I am not going to vote against a good bill that includes the death penalty"). Similar statements of support were heard in the Senate. See, e.g., 139 CONG. REC. S16297 (daily ed. Nov. 19, 1993) (Sen. Levin (D-Mich.): "As a consistent opponent of the death penalty, I wish this bill did not contain the new provisions" . . . but "on balance . . . I will vote for it"); 140 CONG. REC. S12282 (daily ed. Aug. 22, 1994) (Sen. Kennedy making similar statement).

225. See 140 CONG. REC. H2608 (daily ed. April 21, 1994) (recorded vote, 285-141); *id.* at H9004-05 (daily ed. Aug. 21, 1994) (recorded vote, 235-195). By August, much of the Republican opposition had shifted away from the death penalty provisions to opposition to a ban on assault weapons and concern over spending on other crime-related programs. See, e.g., *id.* at H8957 (remarks of Rep. Derrick (D-S.C.)). Nevertheless, Republican opposition in the House to what were perceived as over-protective "unenforceable" death penalty provisions also remained high. See, e.g., *id.* at H8949 (Rep. Gekas (R-Pa.)); *id.* at 8959 (Rep. McCollum (R-Fla.)). The broader political concerns about non-death penalty issues likely explain the final vote of 61-38 in the Senate, *id.* at S12600 (daily ed. Aug. 25, 1994), which was much closer than the November 1993 vote of 95-4 to approve the original Senate bill.

226. Pub. L. No. 103-322, 108 Stat. 1796, 1994, *reprinted in* 1994 U.S.C.C.A.N. 1801.

227. See 108 Stat. 1959-82, *reprinted in* 1994 U.S.C.C.A.N. 1801.

228. Federal Death Penalty Act of 1994, 108 Stat. 1959-68 (1994); *see infra* notes 232-240 and accompanying text.

229. 108 Stat. at 1960, *codified at* 18 U.S.C. §§ 3591(b)(1) & (2) (1994). The CCE statute already provided a mandatory life imprisonment sentence for such "super drug kingpins" if they were "principal administrator[s]" and their operations either grossed \$10 million in a year or involved 300 times the quantity required for lower-level offenders. See 21 U.S.C. § 848(b) (1986).

nificance of these particular new death penalty provisions ought not be understated: the Supreme Court has not approved a death penalty for a defendant who "does not take human life" since it constitutionally struck down the death penalty for rape in *Coker v. Georgia*,²³⁰ and, unlike espionage or treason, there is no common law tradition of execution for these modern non-homicide crimes. The non-homicidal "super kingpin" death penalty provisions have not yet been applied by the DOJ, and their constitutionality hangs in some doubt.²³¹

Moving to substantive offenses, Section 60003 of the FDPA authorized application of its new procedures "if death results" for fifteen federal statutory sections that already contained a death penalty.²³² Section 60004 specifically exempted capital prosecu-

Significantly, the two new provisions in § 3591(b) do not appear to define new federal "offenses;" rather, they authorize the imposition of death after a defendant "has been found guilty of" predicate narcotics offenses under Title 21, upon proof of further aggravating facts. Cf. Serr, *supra* note 10, at 898-906 (arguing that the CCE statute does not define separate federal capital offenses, but rather provides a sentencing enhancement). The Supreme Court has recently struggled with the question of whether significant statutory sentencing enhancements should be treated as separate offenses requiring proof of their elements before a jury beyond reasonable doubt; to date, the Court has ruled (5-4) that such treatment is not required. See *Monge v. California*, 118 S. Ct. 2246, 2250 (1998); *Alamendarez-Torres v. United States*, 118 S. Ct. 1219 (1998) (finding that prior convictions are sentencing factors and not "elements" of a separate offense). However, a variant of the same issue is before the Court again this term. See *Jones v. United States*, No. 97-6203, *cert. granted*, 118 S. Ct. 1405 (1998) (listing the questions presented to include whether "serious bodily injury" is an element or merely a sentencing factor in the federal car-jacking statute). Justice Scalia's unexpected dissent in *Monge* attracted two of the Court's more pro-defendant Justices. See 118 S. Ct. at 2255 (Scalia, dissenting, joined by Souter and Ginsburg, JJ.). Justice Stevens dissented separately. See *id.* at 2253. Because the *Monge* majority agreed that "[o]ne could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense," *id.* at 2250, it is uncertain how the Court would treat the facts required to impose the death sentence under 18 U.S.C. § 3591(b). See generally Gerard E. Lynch, *Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 316-25 (1998) (discussing issue of "elements" versus "sentencing factors").

230. 433 U.S. 584, 598 (1977) (plurality). But see *id.* at 601 (Powell, J., concurring and providing fifth vote) (death penalty may not be disproportionate for "aggravated rape"); *Louisiana v. Wilson*, 685 So. 2d 1063 (1996) (holding that a statutory provision providing possible death penalty for rape of juvenile is constitutional, and distinguishing *Coker*). Because *Wilson* was an interlocutory decision, it did not produce a final judgment available for Supreme Court review.

231. See Boettcher, *supra* note 10, at 1060-61 (1998) (opining that the two new "drug kingpin" death penalty provisions have "less chance of passing constitutional muster").

232. 108 Stat. 1968-70 (1994). These were the so-called "zombie statutes," containing death penalty provisions likely unconstitutional after *Furman* but never repealed. See *supra* note 5. This section made the general death penalty procedures applicable "if death results" for violations of: 18 U.S.C. §§ 34 (destruction of aircraft, motor

tions under the Uniform Code of Military Justice from the new procedural provisions.²³³ Sections 60005 through 60024 then newly provided possible death penalties for at least seventeen preexisting, and ten new, federal offenses.²³⁴ Section 60025 legislatively endorsed the possibility of anonymous jury venires and witnesses in capital cases where an identifying "list may jeopardize the life or safety of any person."²³⁵ Finally, Section 60026 provided something that had never previously been required in any jurisdiction's death penalty statute: appointment of two lawyers in *all* federal capital cases and at least one lawyer "learned in the law *applicable to capital cases*."²³⁶

Accordingly, there were two categories of offenses in the 1994 Act for which death was a newly-authorized possible penalty: en-

vehicles, or facilities); 794(a) (espionage); 844(d) (transportation of explosives), (f) and (i) (destruction of property by fire or explosives); 1091(b)(1) (genocide); 1111(b) (first degree murder); 1201(a) (kidnapping); 1203(a) (hostage-taking); 1716 (mailing injurious articles); 1992 (wrecking trains or railroad property); 2113(e) (bank robbery); 1958 (murder for hire); 1959(a)(1) (murder in aid of racketeering); and 2119(3) (car jacking).

Significantly, in amending the espionage provision, Section 60003 also authorized the death penalty in a non-homicidal context: espionage where the information "directly concerned nuclear weaponry, military spacecraft or satellites," or other types of significant national defense information. 108 Stat. at 1969 (1994); see 18 U.S.C. § 794(a) (1994). Similarly, treason, 18 U.S.C. § 2381 (1948) remains punishable by death under new § 3591(a)(1) (1994) without mention of a "death results" requirement. See 108 Stat. 1960 (1994). Although the constitutionality of imposing a death penalty for a non-homicidal criminal offenses has not been tested since *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality), when the Senate in 1986 considered the legislation that ultimately (and with relatively few changes) became the 1994 FDPA, its Judiciary Committee reported that it had considered *Coker* and had "concluded that it would be constitutional to impose the death penalty for treason and espionage." S. REP. NO. 99-287 (April 16, 1986), p. 10. But see James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983).

233. See 108 Stat. 1970 (1994); see 10 U.S.C. § 801 (1983). In 1996, the Supreme Court unanimously approved the somewhat different military courts martial system for imposing capital punishment, reserving the question of whether *Furman* and its progeny should apply even to that system. See *Loving v. United States*, 517 U.S. 748, 755 (1996). This Article does not further consider the separate federal Military death penalty procedures. For an overview, see Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, 45 FED. LAW. 38 (June 1998).

234. See 108 Stat. 1970-82 (1994).

235. 108 Stat. 1982 (1994).

236. *Id.* (emphasis added) (codified at 18 U.S.C. § 3005 (1994)). Although, federal law had required appointment of counsel in capital cases since 1790, 1 Stat. 118 (1790), capital defendants could receive two lawyers only if specifically requested and neither had to be "learned" in death penalty law. See *United States v. McCullah*, 76 F.3d 1087, 1098 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997) (discussing capital counsel in context of trial conducted under prior version of law); *United States v. Davis*, 365 F.2d 251, 254 (6th Cir. 1966).

tirely new federal offenses,²³⁷ and pre-existing offenses whose language had not previously contained a possible death penalty.²³⁸ Aside from the new “super drug kingpin” provisions in Section 60002 and the new non-homicidal espionage provision in Section 60003,²³⁹ all the new offenses and penalty provisions limit availability of the death penalty to violation in which death results.²⁴⁰ Because some U.S. Code sections may contain more than one offense for which death is now available, and because alternative elements in a single statutory section might arguably be labeled as separate offenses,²⁴¹ the exact number of federal offenses made death-eligible by the 1994 Act is “open to interpretation.”²⁴² Needless to say, by any estimate the 1994 FDPA substantially increased the availability of the death penalty for federal offenders.²⁴³

237. Murder by a federal prisoner, § 60005, 108 Stat. 1970 (codified at 18 U.S.C. § 1118 (1994)); drive-by shooting, § 60008 (codified at 18 U.S.C. § 36 (1994)); foreign murder of U.S. nationals, § 60009, 108 Stat. 1972 (codified at 18 U.S.C. § 1119 (1994)); murder by escaped [life] prisoners, § 60012, 108 Stat. 1973 (codified at 18 U.S.C. § 1120 (1994)); killing persons assisting federal investigations, § 60015, 108 Stat. 1974 (codified at 18 U.S.C. § 1121 (1994)); retaliatory killings of witnesses, victims, and informants, § 60017, 108 Stat. 1975 (codified at 18 U.S.C. § 1513(a) (1994)); violence against maritime navigation and fixed platforms, § 60019, 108 Stat. 1975-79 (codified at 18 U.S.C. §§ 2280, 2281 (1994)); violence at international airports, § 60021, 108 Stat. 1979-80 (codified at 18 U.S.C. § 37 (1994)); and, use of weapons of mass destruction, § 60023, 108 Stat. 1980-81 (codified at 18 U.S.C. § 2332a (1994)).

238. Civil rights offenses and conspiracies, § 60006, 108 Stat. 1970-71, 18 U.S.C. §§ 241, 242, 245(b), 247(c) (1994) (focused on religious persecution); murder of a federal law enforcement official, § 60007, 108 Stat. 1971, 18 U.S.C. § 1114 (1994); sexual abuse and child molestation, § 60010, 108 Stat. 1972-73, 18 U.S.C. § 2245 (1994) (penalty); sexual exploitation of children, § 60011, 108 Stat. 1973, 18 U.S.C. § 2251(d) (1994); gun murders during crimes of violence or drug trafficking, § 60013, 108 Stat. 1973, 18 U.S.C. § 924(c)(1) (1994) (penalty); possession of dangerous weapons in, or in attack upon, a federal facility, § 60014, 108 Stat. 1973, 18 U.S.C. § 930 (1994); obstruction of justice (“protection of court officers and jurors”), § 60016, 108 Stat. 1974, 18 U.S.C. § 1503 (1994); murder of federal witnesses, § 60018, 108 Stat. 1975, 18 U.S.C. § 1512(a)(2)(A) (1994); terrorist death penalty act, § 60022, 108 Stat. 1980, 18 U.S.C. § 2232(a)(1) (1994); and, alien smuggling, § 60024, 108 Stat. 1981-82, 18 U.S.C. § 1324(a) (1994).

239. See *supra* notes 229-232.

240. See 108 Stat. 1970-82 (1994).

241. For example, retaliatory killings of “witnesses, victims, and informants.” See § 60017, 108 Stat. 1975 (codified at 18 U.S.C. § 1513(a) (1994)).

242. Eldred, *supra* note 10, at 297 n.21 (1994); see also Boettcher, *supra* note 10, at 1059 n.126 (noting that counts of death-eligible offenses under the 1994 FDPA have ranged from 30 to 60). The number is at least 44. See *supra* notes 229-238 and accompanying text (discussing two new “super drug kingpin” provisions, 15 “zombie” statutes, 17 pre-existing non-death penalty statutes, and 10 entirely new offenses).

243. Also, as previously noted, *supra* note 8, in 1996 Congress added at least four additional federal death penalty offenses.

3. *Detail About the 1994 Procedures and Comparison to CCE*

The procedures enacted in the 1994 Act are similar, but not identical, to the 1988 CCE procedures, and they are somewhat more detailed. Moreover, the 1988 procedures may still apply in CCE cases; the situation is unclear. Some detailed, but by no means exhaustive, comparison is therefore warranted.

The 1994 Act states that its procedures apply generally to "any [federal] offense for which a sentence of death is provided."²⁴⁴ This immediately raises the question of which statute applies in a death-eligible CCE case, since the specific 1988 CCE death penalty procedures were not expressly repealed in the 1994 Act. Any contention that the 1988 procedures should be considered "repealed by implication" seems questionable, in light of extremely important provisions of the 1988 statute, such as mandatory appointment of habeas counsel and of investigative and expert services,²⁴⁵ that were not replicated in the FDPA. Whether, and precisely how, the 1988 procedures would apply in post-1994 capital cases filed under 21 U.S.C. § 848 is an unsettled question, but in light of a number of potentially significant differences, it is an important one.²⁴⁶ It appears that, so far, courts in post-1994 CCE cases have responsibly attempted to "meld" the two statutes, opting for the measures most protective of the capital defendant when confronted with meaningful differences.²⁴⁷

The gross mechanics of the 1994 Federal Death Penalty structure are by now familiar. Like most post-*Gregg* capital punishment statutes, the 1994 Act requires a separate, "bifurcated" sentencing hearing, after a guilty verdict is returned on a death-eligible offense.²⁴⁸ The sentencing hearing normally occurs before the same jury or judge that heard the guilt evidence.²⁴⁹ In order to proceed

244. 18 U.S.C. § 3591(a) (Supp. II 1998).

245. 21 U.S.C. § 848(q) (1995).

246. See *infra* notes 255-269, 276, 287 (noting specific differences between the CCE and FDPA provisions).

247. Telephone Interview with David Bruck (Dec. 9, 1998). Bruck is one of three federal capital defense specialists that manage the Federal Death Penalty Resource Project ("Project"), coordinating and advising appointed counsel in federal capital cases and serving as liaison to federal courts on the topic. See 1998 JUDICIAL CONF. REPORT ON COSTS, at 29 & n.43 (describing the Project).

248. See 18 U.S.C. § 3593 (Supp. II 1996). A guilty verdict may be arrived at in three ways: by a jury, by a judge sitting as fact-finder without a jury if agreed to by the parties, and by a defendant's own guilty plea.

249. See 18 U.S.C. § 3593(b) (Supp. II 1996). Exceptions are if the defendant waives a sentencing jury and the government agrees, or if the parties waived a guilt

to a death penalty sentencing hearing, the government must previously have served on the defendant a written notice of intent to seek the death penalty, within a "reasonable time before trial."²⁵⁰ This advance notice must specify what aggravating factors the government will seek to prove at sentencing, and it thereafter limits the government to the identified factors. Although the notice may be amended "upon a showing of good cause," courts have split regarding the ease with which the government should be permitted to make such amendments.²⁵¹

Capital sentencing juries are usually reconvened very quickly after they return a guilty verdict. After both sides present evidence and arguments, the jury normally has three basic determinations to make: (1) whether the defendant acted with a requisite *mens rea* making him death-eligible; and, if so, (2) whether other aggravating and mitigating factors are present; and, if so,²⁵² (3) whether a sentence of death is "justified."²⁵³ Each determination, in turn, involves more detailed consideration.

First, the 1994 Act describes four death-eligibility screening factors, which require that a death result from the defendant's conduct and provide differing possible causative acts and *mens rea*. Unless the sentencing jury concludes beyond a reasonable doubt that the defendant caused a death and acted with one of the four

jury but the defendant then requests a sentencing jury, or if the defendant entered a guilty plea, or if the defendant is being re-sentenced for some reason (such as an appellate reversal) after the original jury has been dismissed. *Id.*

250. 18 U.S.C. § 3593(a) (Supp. II 1996).

251. *Id.* Compare *United States v. Battle*, 979 F. Supp. 1442, 1468 (1997) (allowing amendment "because some of the new evidence did not exist until after the government's original notice was filed") with *United States v. Pretlow*, 770 F. Supp. 239, 241-42 (D.N.J. 1991) (under identical CCE provision, 21 U.S.C. § 848(h)(2), court rejects view that stringent "excusable neglect" standard should control). The 1986 Senate Judiciary Report on the legislation that later became the 1994 FDPA stated that the "good cause" amendment provision "recognizes that unforeseen information may become available after notice is given." S. REP. NO. 99-282, at 21 (1986). This suggests that a more generous amendment standard, not dependent on the government's discovery of new information, may not be consistent with congressional intent.

252. If no aggravating factor is proven, then "the court shall impose a sentence other than death." 18 U.S.C. § 3593(d) (1994). Similarly, except for the three non-homicide provisions (super drug kingpin, espionage, and treason), if one of the requisite homicidal *mens rea* standards is not found, then the defendant is not eligible for death. 18 U.S.C. § 3591(a)(2) (1994).

253. 18 U.S.C. § 3591(a)(2). This is the basic structure approved in *Proffitt v. Florida*, 428 U.S. 242 (1976), one of the companion cases to *Gregg*, 428 U.S. 153, where the Court ruled that "the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty." *Proffitt*, 428 U.S. at 258.

described mental states, the defendant is simply not eligible for the death penalty.²⁵⁴ The *mens rea* qualifiers range from "intentionally killed" to a form of recklessness defined as intentionally engaging in violence knowing that a "grave risk of death" was created and a victim died as a "direct result" of such conduct.²⁵⁵ The four FDPA *mens rea* qualifiers are similar, but not identical, to the four mental states listed as "aggravating factors" in the CCE provisions.²⁵⁶ The small language differences between the wording of the FDPA and CCE *mens rea* criteria could nevertheless be powerful in particular cases.²⁵⁷

By specifying *mens rea* from intentionality to recklessness, the 1994 Act prohibits sentencing negligent killers to death. It also bars capital sentencing for anyone "less than 18 years of age at the

254. See 18 U.S.C. § 3591(a)(2). Again, treason, espionage, and "super drug kingpin" provisions are not subject to this statutory limitation. However, each is still limited by the specific mental states required to prove substantive guilt.

255. 18 U.S.C. § 3591(a)(2)(A), (D) (1994). Thus other killings are not eligible for the federal death penalty despite the death of some person. Under the FDPA the death must result to a person "other than a participant" in the crime. *Id.*; see also 18 U.S.C. § 3591(a)(2)(C), (D). This limitation does not appear in the CCE statute. See 21 U.S.C. § 848(n)(2)(c).

The federal *mens rea* criteria appear to narrow the class of "death eligible" killers slightly more than the Constitution itself would require. See *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987) (permitting death penalty for "knowingly engaging in *criminal activities* known to carry a grave risk of death," not just violence as specified in 18 U.S.C. § 3591(a)(2)(D) (emphasis added)). That the slight word difference between the federal standard and *Tison* might be dispositive in some cases is a demonstration of the significant power of semantics in death penalty litigation. See *infra* notes 647-688.

Because the described mental states all relate to conduct causing death, these screening factors cannot apply to the non-homicidal "super drug kingpin" death penalty provisions or to non-homicidal treason or espionage. It was presumably for this reason that these provisions were separately described in subsections 18 U.S.C. § 3591(a)(1) and (b), so that the *mens rea* screens for killers described in 18 U.S.C. § 3591(a)(2) do not apply. Similarly, the FDPA lists separate aggravating factors for "treason and espionage" and "drug offense[s]." 18 U.S.C. §§ 3592(b) and (d) (1994).

256. See 21 U.S.C. § 848(n)(1)(A)-(D) (1994). The first two CCE factors are identical to the FDPA mental states, but the last two are slightly different. The CCE statute also separately defines as death-eligible any person who "intentionally kills . . . or causes the intentional killing" of another. *Id.*; § 848(e)(1)(A). Because 21 U.S.C. § 848(l) also requires that one additional statutory aggravating factor be found, in addition to *mens rea*, before a jury may recommend death, the fact that the four more specific CCE mental states are listed as "aggravating factors" rather than as initial eligibility criteria would appear to be of no practical consequence.

257. One example is that the FDPA requires an "act of violence" under its recklessness factor. 18 U.S.C. § 3591(a)(2)(D). The equivalent CCE provision simply requires "conduct." 21 U.S.C. § 848(n)(1)(D). Death can turn on such differences; the power of language and interpretation in the death penalty context cannot be understated.

time of the offense.” The equivalent CCE provision is slightly different, apparently permitting the *sentencing* of such a youth to death but prohibiting the sentence from being “carried out.”²⁵⁸

If one of the screening mental states is found, then the jury must consider evidence about possibly aggravating and mitigating factors. This stage is considered in some detail below. As for process, both the FDPA and CCE statutes tilt the jury’s consideration of aggravating and mitigating factors somewhat in the defendant’s favor. For example, aggravating factors must be proven by the government beyond reasonable doubt and must be unanimously agreed upon by the jury.²⁵⁹ In contrast, mitigating factors need be proven by the defendant only by a preponderance of evidence, and may be found by any member of the jury individually, “regardless of the number of jurors who concur.”²⁶⁰ Moreover, while the government is prohibited from presenting evidence regarding aggravating factors for which it did not provide proper advance notice, the defense “may present any information relevant to a mitigating factor”²⁶¹ — there is no statutory advance notice requirement for the defense.²⁶²

Regarding the sentencing hearing, the FDPA and CCE statutes both provide that “[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials.”²⁶³ Thus, the Federal Rules of Evidence appear not to apply in federal death penalty hearings.²⁶⁴ Instead, each statute contains its own evidence exclusion rule, with a significant word difference. The CCE statute directs that “information may be ex-

258. Compare 18 U.S.C. § 3591 with 21 U.S.C. § 848(l).

259. 18 U.S.C. § 3593(c), (d) (1994).

260. 18 U.S.C. § 3593(d). In the predecessor legislation to this provision (S. REP. NO. 99-239, introduced in 1985 by Senator Strom Thurmond (R-S.C.)), aggravating and mitigating factors would have been treated equally, permitting jury findings of either based simply on “a majority” of the jury’s members. Establishing Constitutional Procedures for the Imposition of Capital Punishment, S. REP. NO. 99-282, at 1, 5, 7 (1986). The Supreme Court subsequently ruled, however, that “each juror” in a capital case must be “permitted to consider and give effect to mitigating evidence,” whether or not other jurors agree. *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990). In the FDPA *Jones* case currently pending before the Supreme Court, various jurors found a total of 11 separate mitigating factors, none of them unanimously. 132 F.3d at 238 n.3. Interestingly, the number of jurors agreeing on each factor was apparently recorded in *Jones*. The statute does not require this.

261. 18 U.S.C. § 3593(c), (b).

262. 18 U.S.C. § 3593(b).

263. 18 U.S.C. § 3593(c); 21 U.S.C. § 848 (j).

264. See Fed. R. Evid. 1101(d)(3) (“The rules (other than with respect to privileges) do not apply in the following situations: . . . sentencing . . .”).

cluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."²⁶⁵ The FDPA provides identical language except that the word "substantially" is omitted.²⁶⁶ The CCE provision tracks Federal Rule of Evidence 403; the word "substantially" operates to favor admission of relevant evidence.²⁶⁷ The absence of the word "substantially" from the 1994 statute could prove extremely significant if it led to the exclusion of more evidence,²⁶⁸ and judges handling CCE death penalty cases should probably apply the unrepealed CCE provision.²⁶⁹

Rather than return a general verdict — "Death" or "No Death" — a federal capital jury must complete what amounts to a detailed special verdict form. The statute requires the jury to "return [presumably in writing] special findings identifying" any aggravating factor they unanimously find to exist in the case.²⁷⁰ In contrast, the statute does not contain similar language requiring "special findings identifying" any mitigating factors the jury considers (perhaps because mitigating factors may be found by a single member of the

265. Neither statute indicates whether "if" is intended to mean "only if."

266. Compare 21 U.S.C. § 848 (j) with 18 U.S.C. § 3593 (c).

267. See *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950); *United States v. Kerr*, 778 F.2d (11th Cir. 1985).

268. See Boettcher, *supra* note 10, at 1071 (1998). It is unclear whether a tighter evidentiary admission test in capital sentencing proceedings favors the government or the defense; such evidentiary rulings are case-specific and highly dependent on an individual judge's discretion. One can imagine more exclusion of prosecution, as well as defense, evidence under the 1994 standard. For example, grisly photographs of victims, which the prosecution often seeks to admit in death penalty proceedings, would seem to be more easily excluded if a "substantial" outweighing is not required.

269. See 21 U.S.C. § 848(j) (1995). See *supra* notes 244-247 (noting that the 1994 FDPA did not expressly repeal the 1988 CCE death penalty procedures, although the FDPA purports to apply to "any . . . offense for which a sentence of death is provided.").

270. 18 U.S.C. § 3593(d). This includes any non-statutory factors found. See *infra* notes 291-294. The failure to require jury findings regarding non-statutory aggravating factors had been one objection to the 1986 predecessor bill. See S. REP. NO. 99-282 at 52 (1986).

In addition, although the text of 18 U.S.C. § 3593(e) does not expressly require the jury to make any other "special findings," that subsection (which directs the jury to determine whether the aggravating factors outweigh the mitigating, and whether they "justify" a death sentence) is captioned "return of a finding concerning sentence of death." *Accord*, 21 U.S.C. § 848(k) ("return of findings"). This creates some ambiguity regarding whether written jury findings on these other important issues are statutorily required. Although written jury findings can increase the opportunity for a later claim of jury error, they also provide clear evidence of the jury's deliberation. A trial court might be well-advised to request a federal capital jury to return written findings on the issues listed in § 3593(e), as well as on the required *mens rea* factors specified in § 3591(a).

jury). Nevertheless, capital juries are often asked in practice to return written findings regarding the mitigating factors they find proven as well.²⁷¹

The final stage of the federal capital sentencing process is one of "weighing" all the information and considering "justification." If at least one statutory aggravating factor is proven, the statute directs that the jury must determine whether all the aggravating factors "sufficiently outweigh" the mitigating factors, so as "to justify a sentence of death."²⁷² Weighing is a non-mathematical process, not determined merely by whether there are more aggravating or mitigating factors on the jury's list of findings. It requires "qualitative," not quantitative, evaluation.²⁷³ Moreover, weighing and the justification determination are distinct inquiries: even if the jury finds that a case presents no mitigating factors to be weighed against the aggravators, the jury must still decide whether a death penalty is "justified."²⁷⁴ The statute provides jurors with no further guidance on the ultimate task of deciding whether death is "justified," a point that seems worthy of further scholarly attention.²⁷⁵

271. For example, in the *Jones* case each mitigating factor found by one or more of the jurors was reported, together with the number of jurors concurring. *Jones*, 132 F.3d at 238 n.3. Whether the defense should, as a strategic matter, acquiesce in requiring the jurors to report their mitigating factors or their votes on them, when the statute does not require it, is an interesting question.

272. 18 U.S.C. § 3593(e). It should be noted here that "non-statutory" aggravating factors are permitted to be used by the prosecution. See *infra* notes 291-294. Also, it should be noted that a statutory scheme that does not require a finding that aggravating factors "outweigh" mitigating factors, but rather requires a death sentence if the balance is found to be equal, has been declared unconstitutional by one state court. See *Colorado v. Young*, 814 P.2d 834, 839 (Colo. 1991) (en banc).

273. This was noted in the Senate Report for the 1986 predecessor to the FDPA. S. REP. NO. 99-282, at 20 (1986) ("aggravating and mitigating factors . . . are not mechanically determinative of the sentence to be imposed."). See *People v. Brown*, 40 Cal. 3d 512, 541 (Cal. 1985) (weighing is "a metaphor for a process which by nature is incapable of precise description, . . . but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale', or the arbitrary assignment of 'weights' to any of them."). Thus, for example, in *Jones*, 132 F.3d at 252, the jury and the appellate court both found a death sentence to be "justified" although jurors listed eleven mitigating factors and there were, ultimately, only two legitimate aggravating factors to be weighed against them.

274. 18 U.S.C. § 3593(e).

275. Some scholars have, of course, already contributed thoughtfully on this point. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 381-82 & n.129 (1995). The Supreme Court has stated that "reliance on extraneous emotional factors" is not permitted. *California v. Brown*, 479 U.S. 538, 543 (1987). In her controlling concurrence, Justice O'Connor interpreted this to mean that "capital sentencing decisions must not be made on mere whim, but instead on clear and objective standards. . . . [T]he sentence imposed at the penalty stage should

However, the ultimate language of justification does make it clear that in no event is a death sentence mandated.²⁷⁶ Even if the jurors find that aggravating factors “outweigh” any mitigating factors, they can decline to impose death unless they conclude that the greater weight of the aggravators is “sufficient to justify a sentence of death.”²⁷⁷ Also, as in any criminal case, a single juror can block a sentence of death, for a jury’s “recommendation” of death must be unanimous. As such, only a final, unanimous determination by the jury that a death sentence is “justified” by at least one statutory aggravating factor may yield imposition of that penalty.²⁷⁸ Finally,

reflect a reasoned *moral* response to the defendant’s background, character, and crime rather than mere sympathy or emotion.” *Id.* at 544-45 (O’Connor, J., concurring) (emphasis added). As Professor Sundby has noted, Justice O’Connor’s formulation might still be read to permit “human responses outside the traditional realm of logic and reason.” Sundby, *supra* note 136, at 1198. Thus whether *Brown* actually provides jurors with much useful guidance is questionable.

276. This conclusion flows logically from the statutory structure; but notably, the FDPA does not so state expressly. In contrast, the 1988 CCE statute states that “[t]he jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence *and the jury shall be so instructed.*” 21 U.S.C. § 848(k) (1994) (emphasis added). In 1994, the House’s proposed 18 U.S.C. § 3593(e) repeated this sentence. See H.R. REP. NO. 103-467 at 18 (1994). Thus its omission from the final bill must have been a conscious decision, possibly as a compromise to balance the rejection of the “Gekas amendment” which would have mandated death when aggravating circumstances were found to outweigh the mitigating factors. See H.R. REP. NO. 103-467, at 21-22 (1994) (dissenting views). In any case, omission of the explicit CCE sentence removes the requirement that the jury in a non-CCE capital case must be so *instructed*. This difference provides another example in which it seems that the non-repealed CCE procedures would have to be followed, rather than the FDPA, in a CCE death penalty case. See generally, *supra* notes 246, 256-269.

277. 18 U.S.C. § 3593(e) (1994). A similar determination is required even if no mitigating factors at all are found: the jury must still decide “whether the aggravating factor or factors alone are sufficient to justify a sentence of death.” *Id.* As previously noted, *supra* notes 219, 276, some House Republicans opposed the 1994 legislation in the Judiciary Committee because it did not mandate the death penalty in the absence of mitigating factors or where the aggravators outweighed the mitigators. H.R. REP. NO. 103-467 at 21 (1994).

278. 18 U.S.C. § 3593(e) (1994). A subtle, but possibly important nuance, is that under the federal death penalty statutes as written, the jury must find that it is the *aggravating factors* that “justify” a sentence of death in the particular case at hand, and not some sense of morality, the case in general, or some other non-statutory consideration. This could be important for a defendant to stress in a case involving disturbing facts which, for some reason, are not captured within aggravating factors for which proper notice has been given.

Interestingly, the 1986 predecessor bill to the FDPA contained a provision that would have granted the factfinder discretion not to impose the death penalty *even if* the factfinder found that a sentence of death was “justified” after weighing all the factors. S. REP. NO. 99-282, at 23 (1986). This provision ultimately was dropped, however, possibly because such a provision would have given juries completely un-

if the jury properly "recommends" death under this scheme, the court "*shall* sentence the defendant accordingly," and if the jury does not recommend death, the sentencing judge may not override that verdict. Thus the jury's sentence is not a "recommendation" at all, but rather a binding determination.²⁷⁹

Like the 1988 CCE statute, the 1994 federal death penalty procedures contain antidiscrimination provisions. The FDPA requires the judge to instruct the sentencing jurors (1) that they "shall not consider" race, gender, religious beliefs or other inappropriate characteristics of the defendant or of any victim, and (2) that they must conclude that they would recommend a death sentence for the crime in question "no matter what" such racial, gender, or other factors might be.²⁸⁰ In addition, a certificate to this effect, signed by each juror, must be submitted to the court with the sentencing verdict.²⁸¹

*a. Aggravating and Mitigating Factors Under the CCE and
FDPA Statutes*

Increasing the magnification of our focus on the statutory federal death penalty procedures, let us consider aggravating and mitigating factors in some further detail. The statutory lists of potential aggravating and mitigating factors in the 1994 Act are substantially the same as — but again not identical to — the lists in the 1988 CCE statute.²⁸² For example, the 1994 statute lists seven specific

checked and unguided discretion to decide who lives and dies, a seemingly unconstitutional breadth of discretion under *Furman* and *Gregg*.

279. 18 U.S.C. § 3594 (1994). The 1986 Senate Report explained the non-literal use of "recommendation" as follows: "[w]hile, by virtue of this provision, the jury finding in effect determines whether the sentence shall be death, it remains the province of the court to *impose* sentence." Congress expressly considered and rejected a different system used in Florida, where the judge may "override" the jury's sentence recommendation. S. REP. NO. 99-282, at 24 (1986). Cf. Robinson, *supra* note 6, at 1525-26 (arguing that the CCE statute should be amended to permit a "one-way" judge override only of jury recommendations of death).

280. 18 U.S.C. § 3593(f) (1994). See 21 U.S.C. § 848(o)(1) (1994) (containing the same language).

281. 18 U.S.C. § 3593(f). This certificate appears to be intended to impress upon the jurors the importance of the non-discrimination requirements. Indeed, a formal oath may carry moral force with some jurors. Moreover, though it is difficult to envision in practice, a federal capital juror probably could be prosecuted for returning a false certificate. See 18 U.S.C. §§ 1001, 1503 (1994).

282. This section compares 18 U.S.C. §§ 3592(a) (1994) ("Mitigating factors") and (b), (c), (d) (1994) ("Aggravating factors") to 21 U.S.C. §§ 848 (m) (1994) ("Mitigating factors") and (n) (1994) ("Aggravating factors for homicide").

mitigating factors while the 1988 Act listed nine;²⁸³ both Acts also included a "catchall" mitigation category.²⁸⁴ Omitted from the 1994 statutory mitigation list are (1) that the defendant was "youthful, although not under the age of 18," and (2) that the defendant "could not reasonably have foreseen that [his] conduct . . . would cause, or would create a grave risk of causing, death"²⁸⁵

The CCE "forseeability" factor is arguably accounted for in the FDPA's initial *mens rea* eligibility factors, the least stringent of which provides for death eligibility only if the defendant "*intentionally . . . engaged in an act of violence, knowing that the act created a grave risk of death*"²⁸⁶ But this statutory change is more than just style: the shift of this *mens rea* factor from the mitigation category in 1988 to being a death-eligibility screening factor in 1994 can be of vital significance. If a mitigator is proven by a defendant, it merely places the factor into the "weighing" process — death can be imposed despite the existence of the mitigator. On the other hand, if a screening factor is shown not to be applicable, then the death sentencing process stops — the defendant is not eligible for death under 18 U.S.C. § 3591. Thus a single juror's conclusion that a capital defendant was not reckless can end the matter under the FDPA, but possibly not under the CCE.²⁸⁷

283. The 1994 Act also provides short descriptive headings for each factor, such as "impaired capacity," "duress," "minor participation," and "equally culpable defendants," not found in the CCE statute. 18 U.S.C. § 3592(a).

284. See 18 U.S.C. § 3592(a)(8) (1994); 21 U.S.C. § 848(m)(10) (1994). A "catchall" mitigation category is constitutionally required under *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). See *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (stating that "the sentencer may not . . . be precluded from considering 'any relevant mitigating evidence'"). The 1988 statute described its catchall category as any "other factors in the defendant's background or character [that] mitigate against imposition of the death sentence." 21 U.S.C. § 848(m)(10) (1994). In the 1994 Act, the catchall category was expanded to encompass "other factors in the defendant's background, record, or character *or any other circumstance of the offense. . . .*" 18 U.S.C. § 3592(a)(8) (emphasis added). The new phrase tracked a state statute upheld by the Supreme Court in 1990. See *Blystone v. Pennsylvania*, 494 U.S. 299, 305-08 (1990).

With regard to unconstrained mitigating factors, Justice Scalia has written that the two leading principles of post-*Furman* capital punishment jurisprudence — the *Gregg* principle of guided discretion and the *Lockett* principle of unconstrained individualized consideration — "cannot be reconciled." *Walton*, 497 U.S. at 664 (Scalia, J., concurring). Professor Sundby has suggested that, while perhaps the two principles may seem a paradox, they may not be irreconcilable. See Sundby, *supra* note 136, at 1167.

285. 21 U.S.C. § 848(m)(4), (5) (1994). See 18 U.S.C. § 3592(a).

286. 18 U.S.C. § 3591(a)(2)(D) (1994) (emphasis added).

287. Because of this significant difference, if a CCE capital case involved a close question on such a *mens rea* issue, the defendant might want to argue, contrary to

As for the youthful-but-over-eighteen factor, while it is omitted from the FDPA, a defendant may still seek to prove it under the "catchall" category of mitigating evidence and *Lockett*.²⁸⁸ Thus, while one hesitates to find insignificance in even the slightest alteration of death penalty language, its omission in 1994 seems to be of little significance.

With regard to potential aggravating factors, the 1994 statute is significantly more detailed than the 1988 CCE statute. Because the 1994 Act addresses a broad array of federal criminal offenses, including some not requiring killings, it provides separate lists of aggravating factors for "espionage and treason," for "drug offense[s]," and for "homicide."²⁸⁹ As a consequence, the 1994 Act specifies a total of twenty-six aggravating factors; the 1988 legislation lists only twelve. The number of aggravating factors listed in the statute can be extremely important, because unless one of the *statutory* aggravating factors is unanimously found by the jury, a death sentence may not be imposed.²⁹⁰ It thus follows that the more aggravating factors that are provided in the statute, presumably the more cases in which death is at least a possibility.

In addition, both statutes permit the government to seek to prove other aggravating factors not listed in the statute itself, so long as the required advance notice has been given.²⁹¹ Such non-statutory aggravating factors can add to the final "justification" balance; but significantly, they may not serve *alone* as justification for a federal death penalty.²⁹² The possibility of non-statutory aggravating factors permits a certain amount of "creativity" in the capital prosecutor's role, and allows prosecutors to address significant factors that may be present in particular cases but which the legislature did not foresee. The availability of non-statutory aggravators is a mixed

suggestions made above, *see supra* notes 257-66, that the 1994 FDPA procedures should be applied.

288. *See supra* notes 259, 284.

289. *Compare* 18 U.S.C. §§ 3592(b), (c), (d) (1994), with 21 U.S.C. § 848(n) (1994). *See supra* notes 229-30, 251, 254 (discussing non-homicide death penalty offenses).

290. The statute makes this point rather obliquely, stating that "[i]f no aggravating factor set forth in [18 U.S.C. § 3592 (the list of aggravating factors)] is found to exist, the court shall impose a sentence other than death [that is] authorized by law." 18 U.S.C. § 3593(d); *accord*, 21 U.S.C. § 848(k) (1994).

291. *See* 18 U.S.C. §§ 3592(b), (c), (d); 21 U.S.C. at § 848 (n). The Supreme Court has upheld the practice of relying on non-statutory factors, in mitigation and, if the statute so authorizes, in aggravation. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (discussing mitigating factors); *Barclay v. Florida*, 463 U.S. 939, 956 (1983) (discussing aggravating factors).

292. 18 U.S.C. § 3593(e) (stating that a statutory aggravating factor must be "found to exist" before death can be considered); 21 U.S.C. § 848(k) (same).

blessing for prosecutors, however: it naturally produces some incentive for "overkill," out of fear of losing an opportunity to prove some fact whose relevance becomes clear later. Yet overinclusion of hoped-for, non-statutory aggravating factors can yield opportunity for error which would not have been present had the prosecutor simply stuck to proving factors listed in the statute.²⁹³ Lacking specific legislative endoresement, they may more easily be found improper or duplicative upon appellate review.²⁹⁴ Because at least one statutory aggravator must always be proven for a case to be death-eligible, the utility of non-statutory aggravating factors is debatable in many cases. Non-statutory aggravators have been the focus of much of the federal capital litigation since 1988, and federal prosecutors should think carefully before deciding they are necessary to successfully pursue a capital case.

All twelve of the potential aggravating factors specified in the 1988 CCE Act are replicated in the 1994 Act, mostly in identical language.²⁹⁵ Many of these involve prior convictions; for example, having prior convictions for two felonies involving serious bodily injury, two controlled substance distribution felonies, or a prior CCE conviction, can expose a defendant to the death penalty under both statutes. Other replicated aggravating factors include: (1) creating a grave risk of death to other persons besides the victim(s); (2) substantial planning and premeditation; (3) a victim "particularly vulnerable due to old age, youth, or infirmity;" (4) procuring the offense by payment or promise of payment; (5) committing the offense for pecuniary gain (*i.e.*, "in the expectation of the receipt of anything of pecuniary value"); or (6) committing the

293. Stephen B. Bright, a well-known death penalty defense lawyer and director of the Southern Center for Human Rights, has said that any prosecutor who adds non-statutory aggravating factors "takes a chance" and can lead to the government "sho[oting] itself in the foot." David E. Rovella, *Preparing for the Penalty Phase: There are Actually Two Oklahoma Bombing Trials Afoot in Denver*, NAT'L L.J., May 12, 1997, at A15.

294. This was the error in the *Jones* case, which resulted in review by the Supreme Court, as well as *McCullough*, in which the death sentence was reversed. See *United States v. McCullah*, 76 F.3d 1087, *reh'g en banc denied*, 87 F.3d 1136 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997); see *Jones*, 132 F.3d at 252. Meanwhile, in both cases significant statutory aggravating factors were found by the jury and affirmed on appeal, so that it seems in hindsight that the government may have been better off simply sticking to the statute.

295. There are some specific language changes, but the substance of all the factors is largely identical. For example, compare 21 U.S.C. § 848(n)(3) (1994), with 18 U.S.C. § 3592(c)(4) (1994); compare 21 U.S.C. § 848(n)(10) (1994), with 18 U.S.C. § 3592(c)(13) (1994).

offense "in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim."²⁹⁶

The last two aggravating factors, "pecuniary gain" and "serious physical abuse," are considered at some length below.²⁹⁷ For now I will simply assert that when the generality of these statutory aggravating factors and their commonality in many murders are considered together with the added authority to invoke non-statutory aggravators, it is the rare federal defendant that could not, in theory, be sentenced to death simply upon conviction of any killing offense.

b. Appeals, Implementation, and Results

Under both statutes, once a federal death penalty is returned, a defendant is entitled to appellate review "upon appeal by the defendant."²⁹⁸ It appears, however, that the defendant must properly request appellate review; unlike some state statutes, the federal death penalty procedures do not authorize automatic capital sentencing review.²⁹⁹

Under the 1988 CCE statute, the appellate court may affirm a death sentence only if, after thorough review, the court concludes that the evidence supports all the aggravating factors found as well as the mitigating factors (or their absence), and that "the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor."³⁰⁰ Courts have consistently rejected the argument that because this last phrase does not expressly authorize

296. 18 U.S.C. § 3592(c)(5)-(9), (11) (1994); 21 U.S.C. §§ 848(n)(5)-(9), (12) (1994).

297. See *infra* notes 647-688 and accompanying text.

298. 18 U.S.C. § 3595 (1994); 21 U.S.C. § 848(q)(1) (1994).

299. The Supreme Court has "emphasized repeatedly" that "meaningful appellate review" is "crucial" to a constitutional capital punishment structure. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). While some states review all capital verdicts automatically, however, this does not appear to be constitutionally required. See *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990) (sidestepping question of whether appellate review of a death sentence is constitutionally required despite defendant's decision not to appeal); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (allowing capital defendant who waives all appeals to be executed); *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("review by an appellate court . . . , however grave the offence [sic] . . . is not now [] a necessary element of due process . . ."). Whether denial of capital sentencing review due to a technically improper appeal notice, rather than a competent and voluntary decision to forego appeal, would survive constitutional muster is a yet-unanswered question under the 1994 FDPA. But cf. *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991) (holding state collateral review petition filed three days late in capital case sufficient to foreclose federal review); see also S. REP. NO. 99-282, at 24 (1986) (stating that any "[n]otice of appeal must be filed within the time prescribed" by statute).

300. 21 U.S.C. §§ 848(q)(2), (3) (1994).

appellate review for "legal errors" it is unconstitutional, concluding instead that the statute implicitly authorizes review for "harmful errors of law."³⁰¹ Nevertheless, and presumably in reaction to such attacks on the CCE statute, the 1994 Act specifies that appellate remand of a death penalty is also required for "any other legal error requiring reversal . . . [if] properly preserved"³⁰² The 1994 statute also expressly provides a "harmless error" affirmance rule, stating that a court of appeals "shall not reverse or vacate a sentence of death" so long as "the Government establishes beyond reasonable doubt that the error was harmless."³⁰³

The 1994 Act broadly permits government employees to decline to participate in executions if it contravenes their moral or religious beliefs.³⁰⁴ In addition, unlike the CCE statute, the 1994 Act also addresses "implementation" of federal death sentences. Section 3596 provides that U.S. Marshalls shall "supervise" implementation "in the manner prescribed by the law of the State in which the sentence is imposed."³⁰⁵ That statute also recognizes that the federal death penalty might be applied anywhere in the nation, although a quarter of the states do not authorize capital punishment. If the state in which the federal sentence is imposed does not authorize capital punishment, "the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence must be implemented [there]."³⁰⁶ In fact, the federal government has con-

301. *Pretlow*, 779 F. Supp. at 764 (D.N.J. 1991); *United States v. Pitera*, 795 F. Supp. 546, 566-67 (E.D.N.Y. 1992).

302. 18 U.S.C. § 3595(c)(2)(C) (1994).

303. 18 U.S.C. § 3595(c) (1998). Application of the harmless error standard on appeal is one of the questions before the Supreme Court in the *Jones* case.

304. *See* 18 U.S.C. § 3597(b) (1994); 21 U.S.C. § 848(r) (1994). Notably, the equivalent CCE provision is limited to *prison* employees and contractors. *See* 21 U.S.C. § 848(r) (1994).

305. 18 U.S.C. § 3596(a) (1994).

306. *Id.*; *accord* 18 U.S.C. § 542 (1940). The 1994 Act also specifies that the death penalty may not be "carried out" on a woman "while she is pregnant," nor on a "mentally retarded" or person who "lacks the mental capacity to understand the death penalty and why it was imposed." 18 U.S.C. § 3596(b), (c) (1998). This latter provision had been championed by Senator Kennedy (D-Mass.) since at least 1986. *See* S. REP. NO. 99-282, at 48-49 (1986). Finally, the federal death penalty does not apply to persons subject to Indian tribal jurisdiction for offenses that occur in Indian Territory and for which there is no independent federal jurisdiction, unless the tribe elects to permit the federal death penalty to apply. *See* 18 U.S.C. § 3598 (1998). Although there are a number of distinctions, this statutory deference to Indian tribal jurisdiction, but not to state legislative decisions not to authorize capital punishment, provokes interesting federalism questions. *See supra* note 36.

structed a federal execution facility at a prison in Terre Haute, Indiana.³⁰⁷

Although thirteen House Republicans predicted in 1994 that the FDPA's procedures were so pro-defendant that "it is doubtful that these penalties will ever be implemented,"³⁰⁸ there are presently twenty persons currently on federal death row.³⁰⁹ They are all male, and fifteen of them are not caucasian (thirteen are African-American, one is Hispanic and one is Asian-American).³¹⁰ All are in various stages of appellate review, which presumably will include one – but only one — federal habeas petition.³¹¹ Although a number of persons indicted for federal death-eligible sentences have avoided that final judgment at trial, only one person actually sentenced to death under the 1994 Act has prevailed so far, on appeal.³¹² No reviewing court has identified any pervasive statutory or constitutional flaw in the procedures, and while it is dangerous business to predict Supreme Court results, it seems unlikely that *Jones* will result in any systemic striking down of FDPA provisions.³¹³ Although his case presents a serious guilt issue, Ronald Chandler appears to be the farthest along on the path to federal execution: his sentence has been finally affirmed on direct appeal and his appeal of the district court's denial of his federal habeas petition was argued on October 28, 1998.³¹⁴ It seems entirely likely

307. See *Federal Death Penalty Law Still to be Tested*, BOSTON GLOBE, June 14, 1997, at A10.

308. H.R. REP. NO. 103-467, at 22 (1994); see *supra* note 277.

309. See *Federal Death Row Prisoners*, *supra* note 6.

310. *Id.*

311. Amendments in 1996 to 28 U.S.C. § 2255 considerably tightened existing case law requirements for "successive" federal habeas petitions. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220; 28 U.S.C. § 2255 (1998) ("The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," and "a 1-year period of limitation shall apply to a motion under this section.").

312. John McCullah, a white male sentenced to death for a drug-related kidnap murder, had his case remanded for resentencing after an appellate panel (affirmed by an evenly-divided *en banc* court) accepted his argument that one of the aggravating factors the jury had relied upon impermissibly duplicated an element of the offense. See *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996), *reh'g denied en banc*, 87 F.3d 1136 (10th Cir.) (denying rehearing *en banc*, 6-6), *cert. denied*, 117 S. Ct. 1699, 137 L. Ed.2d 825 (1997). He is awaiting resentencing as of February 1999.

313. See 132 F.3d 232 (5th Cir. 1998). Other courts that have upheld the 1994 FDPA provisions include *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *reh'g denied en banc*, 161 F.3d 10 (5th Cir. 1998); *United States v. Battle*, 979 F. Supp. 1442 (N.D. Ga. 1997); *United States v. Nguyen*, 928 F. Supp. 1525 (D. Kan. 1996).

314. See *supra* note 199. In Texas, Juan Garza's federal habeas corpus petition has also been denied, and an appeal is pending before the Fifth Circuit. See *United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998). Moreover, it is possible that a federal "volun-

that sometime near the end of this millennium or the beginning of the next, the federal death penalty will in fact be implemented by execution.³¹⁵

G. DOJ Implementation

In 1992 President Clinton supported capital punishment as a candidate. But when Janet Reno was nominated by the President as Attorney General, she initially indicated that she opposed capital punishment.³¹⁶ Meanwhile, other Democratic congressional leaders remained opposed to a federal death penalty. Janet Reno thus confronted questions at her March 1993 confirmation hearing from both sides of the capital punishment debate.³¹⁷ She noted that as the Dade County State's Attorney, she had authorized and obtained the death penalty in a number of cases. But she also acknowledged concern about the troubling data regarding racial disparities in capital punishment.³¹⁸ Although *McCleskey* had disposed of this issue as a constitutional matter in 1987, that decision did not remove the statistical evidence itself nor the deep concern it created among some congressional leaders.³¹⁹ Reno the nominee responded that the DOJ would fairly and non-arbitrarily administer a federal death penalty system, and indicated that she "looked forward to" developing the legislation that ultimately became the

teer" could reject further appellate proceedings before execution. See *supra* note 38 (discussing the Hammer case).

315. It is entirely possible that lower courts will withhold action on pending FDPA appeals until the Supreme Court issues an opinion in *Jones*. Nevertheless, assuming that the Court decides *Jones* by July 1999, Chandler's or Garza's habeas appeal could be decided by late 1999. Further assuming that certiorari petitions are rejected, they could face an execution date sometime in the year 2000. The next millennium, of course, begins on January 1, 2001.

316. See *Search for Attorney General Finally Final* (National Public Radio, Feb. 12, 1993) (re-broadcasting Reno's nomination press conference), available in 1993 WL 9570448 ("Ms. Reno: 'I'm personally opposed to the death penalty, as I've told the [P]resident. But I've probably asked for it as much as many prosecutors in the country, and have secured it. And when the evidence and the law justify the death penalty, I will ask for it.'"). See also *Attorney General Reno Visits NYU*, NYU L. SCH. MAG. (Autumn 1998) (reporting that Reno "confessed to being personally opposed to the death penalty").

317. See, e.g., *RENO CONFIRMATION HEARINGS*, *supra* note 214, at 53 (Senator Metzenbaum (D-Ohio) notes concerns regarding racial disparities); *id.* at 75 (Senator Specter (R-Pa.) seeks assurances that Reno will not oppose capital punishment).

318. *Id.* at 53.

319. John Conyers in particular, the senior Democratic member of the House Judiciary Committee, is African-American and expressed particular concern regarding the *McCleskey* issues. See H.R. REP. NO. 458 (1994) ("There is compelling evidence from certain jurisdictions that the race of the defendant may be a factor governing the imposition of the death sentence").

1994 FDPA.³²⁰ Once the FDPA became law, the now-confirmed Attorney General Reno quickly set about implementing its provisions.

1. *The DOJ Capital Case Protocols*

On January 27, 1995, little more than three months after the FDPA was enacted, the Attorney General issued what is known within the DOJ as the "Death Penalty Protocol."³²¹ More particularly, a "bluesheet" was issued to all "Holders of the *United States Attorneys' Manual*"³²² which replaced the prior section on "Capital Crimes."³²³ This directive addressed "Federal Prosecutions in Which the Death Penalty May Be Sought," and set forth "policy and procedures to be followed in *all federal cases* in which a defendant is *charged with an offense subject to the death penalty*, regardless of whether the United States Attorney intends to request authorization to seek the death penalty."³²⁴

In order to ensure national "consistency" in administration, the DOJ protocols state that "[t]he death penalty shall not be sought

320. RENO CONFIRMATION HEARINGS, *supra* note 214, at 75 (death penalty should be "carried out in a fair, reasoned way"); *see id.* at 101 ("prevent disparate treatment" and "reinforce procedures to make sure that [race disparities] will not happen"); *id.* at 100 ("I look forward to working with you in developing death penalty statutes that will withstand the most vigorous scrutiny"); *id.* at 158-59 (Let's "walk together in this next year to see if we can pass a bill . . .").

321. *See infra* note 328. A copy of the memorandum announcing the Protocol is on file with the author. *See UNITED STATES ATTORNEYS' MANUAL*, *supra* note 12, § 9-10.000 ("Capital Crimes"), available in the DEP'T OF JUSTICE MANUAL, *supra* note 12, and through the Department of Justice website, *supra* note 12. The author served as an Associate Deputy Attorney General in the DOJ in 1996-97, and served on the Attorney General's capital case review committee pursuant to the Protocol. He feels competent, therefore, to report that the protocol provisions are also sometimes referred to in the plural, as "the protocols." *See also* Walker v. Reno, 925 F. Supp. 124, 128-29 (N.D.N.Y. 1995) (describing the "Protocol").

322. The UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, is a collection of internal policy statements and procedures issued by the DOJ to guide its personnel on a myriad of issues. Although a prosecutor's violation of a UNITED STATES ATTORNEYS' MANUAL provision may provide a basis for internal discipline, courts consistently have held that the UNITED STATES ATTORNEYS' MANUAL does not create any enforceable legal rights. *See, e.g.,* Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1996), *aff'd*, 124 F.3d 1376 (10th Cir. 1997) (so holding with regard to the 1995 death penalty protocols); *accord* United States v. Snell, 592 F.2d 1083, 1087 (9th Cir. 1979) ("violation of the internal housekeeping rules of the DOJ" is not ground for reversal).

323. *See supra* note 321. "Bluesheets" [hereinafter DOJ Bluesheets] are amendments to the UNITED STATES ATTORNEYS' MANUAL that are issued with some frequency, and are so called because they are issued on blue-colored paper so as not to be missed.

324. *See infra* notes 512-529 (emphasis supplied) for a discussion of the emphasized language.

without the prior written authorization of the Attorney General.”³²⁵ The basic requirement of the protocols is that “[in] all cases in which the United States Attorney intends to charge a defendant with an offense subject to the death penalty, *whether or not the United States Attorney recommends the filing of a notice of intent to seek the death penalty*, the U.S. Attorney *shall* prepare a ‘Death Penalty Evaluation’ form and a prosecution memorandum,” and obtain the Attorney General’s personal approval before proceeding with a federal death penalty prosecution.³²⁶

Requests for authorization are processed through the Criminal Division.³²⁷ The on-line version of the *United States Attorneys’ Manual* “encourage[s],” but does not require, U.S. Attorneys to “consult” with Main Justice before indicting potential death penalty cases.³²⁸ It also cross references a list of “capital eligible statutes” found in something called the *Criminal Resource Manual*; in turn, that statutory list is broken down among the various Sections within the Department’s Criminal Division that are assigned to advise and oversee the administration of the particular statutes.³²⁹

The DOJ protocols state that notice of intent to request approval to seek the death penalty “should” be given to defense counsel, at the time of indictment or before the U.S. Attorneys’ office decides to seek DOJ “approval” for the penalty, “whichever comes first.”³³⁰ This statement of timing for notice to the defense uncon-

325. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, §§ 9-10.020, 9-10.080. The Attorney General’s personal approval has been a Main Justice requirement since at least 1988, prior to enactment of the CCE statute.

326. *Id.* § 9-10.040 (emphasis added). The 17-page Death Penalty Evaluation form was attached in blank as an Appendix to the original Protocol. It is now available in a separate publication called the *Criminal Resource Manual*. See DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL 71 (last visited Jan. 20, 1999) <www.usdoj.gov/usao/eousa> [hereinafter CRIMINAL RESOURCE MANUAL] (listing all federal death eligible statutes and the Main Justice sections assigned to supervise each and noting that different death penalty evaluation forms are available for different charged offenses). With the establishment of a Capital Cases Unit in DOJ to handle all potential capital cases, *see infra* note 343, the need for this section assignment list has been mooted.

327. DEP’T OF JUSTICE MANUAL, *supra* note 12, § 9-2.148.

328. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, § 9-10.020.

329. *Id.*; *see supra* note 326. This cross-reference was not contained in the original 1995 Protocol, because the CRIMINAL RESOURCE MANUAL was not published until the *United States Attorneys’ Manual* was reorganized in 1997. In that reorganization, much material was excised from the *United States Attorneys’ Manual* in order to make that multi-volume source more manageable, and was transferred to the CRIMINAL RESOURCE MANUAL.

330. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, § 9-10.030 (“Notice of Intention to Seek the Death Penalty”). Obviously, the simple fact of indictment under a death eligible statute gives the defendant notice of the possibility of death. Thus the Protocol notice provision actually seems intended to encourage some more

sciously reflects an unfortunate ambivalence that runs throughout the Capital Case protocols: is the “trigger” for submission to Main Justice for review simply any case in which the death penalty *might* be sought (“regardless of whether the U.S. Attorney intends to” seek it³³¹), or is it only when the U.S. Attorney “decides to request *approval*” of a death penalty prosecution?³³² The possibly deleterious effects of this ambiguity, and a suggestion for amendment, are discussed below.³³³

The stated purpose of defense notice is to “give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors,” to the U.S. Attorney.³³⁴ If, after considering any defense submission, the U.S. Attorney still “decides to request approval to seek the death penalty,” the office “should” inform counsel for the defendant.³³⁵ The hortatory nature of the defense notice provisions is somewhat mystifying, because in fact the defense receives notice of Main Justice death penalty review in every case that is submitted.³³⁶

For every case submitted for review, the U.S. Attorney is required to provide to Main Justice a completed “Death Penalty Evaluation” form and a memorandum outlining the facts and relevant law, as well as “whether or not” the office recommends seeking the death penalty.³³⁷ The trigger for submission is again stated as whether the defendant is “charge[d] . . . with an offense subject

specific notice to the defense, when the U.S. Attorney’s office actually determines that death penalty *approval* should be sought from Main Justice. Interestingly, although it not infrequently occurs, the possibility that the U.S. Attorney’s office would submit the case for DOJ review with a recommendation *against* the death penalty is not expressly addressed by this notice provision.

331. *Id.* § 9-10.010; *see also* DOJ Bluesheet, *supra* note 321, Jan. 27, 1995 (statement of “Purpose”).

332. *Id.* § 9-10.030.

333. *See infra* notes 512-529.

334. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, § 9-10.030.

335. *Id.*

336. According to the UNITED STATES ATTORNEYS’ MANUAL, § 9-10.050, defense counsel “shall” be provided an opportunity to present their views to the Department’s capital case review committee, so defense counsel necessarily receives notice that the Department is considering the death penalty. Whether the defense notice provision should be interpreted to require that U.S. Attorneys inform defense counsel of the *substance* of their recommendations, including whether a recommendation is for or against the death penalty, has been much debated. There are good reasons for not informing defense counsel of the substance of a U.S. Attorney’s recommendation (which is only preliminary in any case), and in fact defense counsel are not always so informed. *See infra* note 401.

337. *Id.* § 9-10.040. The form “is intended primarily to be used as a guideline and worksheet for the internal decision making process, and may be hand-written.” *Id.*

to the death penalty.”³³⁸ The submission to Main Justice must also provide “any other relevant information,” copies of other “significant documents” (such as confessions or investigative reports), and any written material that defense counsel has provided to the U.S. Attorney.³³⁹

The central innovation of the Attorney General’s capital case review protocols is the formal establishment of a high level Capital Case Review Committee at Main Justice. It is the only capital punishment review committee in existence to have nationwide jurisdiction.³⁴⁰ The Committee is appointed by the Attorney General and must include designees of the Deputy Attorney General and the Assistant Attorney General for the Criminal Division.³⁴¹ With one exception the identity of the Review Committee’s members has necessarily changed over time, but a consistent virtue of the Committee has been that its members have been high-ranking attorneys within the DOJ hierarchy who have direct and speedy access to the highest decision-makers in the Department.³⁴² This ensures responsiveness within Departmental and U.S. Attorneys’ offices when questions arise, and speedy decisions from the Attorney General when necessary. The Committee also has had excellent staff assistance from the Criminal Division. In late 1998, in acknowledgment of the importance of federal death penalty review as well as the increasing workload, a formal Capital Cases Unit was established within the Criminal Division to staff all death penalty reviews as well as to advise federal capital prosecutors in the field.³⁴³

338. *Id.*

339. *Id.*

340. Cf. John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2573, 2580 (1997) (suggesting the creation of a state-wide committee to address localized differences within state).

341. See UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, § 9-10.050. Until 1997 the Committee met with three members. In 1997, a fourth member was added to the Committee, a female African-American prosecutor with substantial trial experience.

342. Since Attorney General Reno established the Committee, the only continuous member has been Kevin DiGregory, a Deputy Assistant Attorney General in the Criminal Division and a career prosecutor who tried death penalty cases when he was a Deputy in Janet Reno’s State’s Attorney Office in Dade County, Florida. The other members have changed over time, but they have all had high level access and “clout” within the Department. For example, the Deputy Attorney General’s first designee to the Committee was then-Associate Deputy Attorney General Seth P. Waxman, who is now serving as the Solicitor General of the United States.

343. Robert Schmidt, *Death Row’s Price Tag*, 21 LEGAL TIMES, No. 21 (Oct. 12, 1998), at 1.

Once a potential death case is submitted to Main Justice for review, defense counsel for each defendant must be granted an opportunity to make a presentation (oral, written, or both) to the Review Committee.³⁴⁴ The Committee must consider all information provided to it, including any evidence of "racial bias" against the particular defendant in the case and any more general evidence of any "pattern or practice of racial discrimination" by the Department "in the administration of the Federal death penalty."³⁴⁵ However, the protocols do not suggest what role any such evidence should play in a particular authorization decision.³⁴⁶

The express inclusion of this language regarding possible race bias demonstrates the centrality of this concern in Attorney General Reno's administration of the death penalty; the protocols plainly were written with the race-bias concerns of *McCleskey* in mind. Echoing the statute, 18 U.S.C. § 3593(f), the protocols direct that "bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty."³⁴⁷ In fact, to guard against such bias on a possibly unconscious level, the Attorney General has directed that prosecutorial death penalty review submissions be "race blind," that is, devoid so far as possible of racial identifica-

344. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.050.

345. *Id.*

346. As noted above, of the 20 prisoners currently under a federal sentence of death, 13, or 65%, are African-American; 75% are non-caucasian. See *Federal Death Row Prisoners*, *supra* note 6. This is a small sample; but it is the only publicly disseminated data. Attorney Kevin McNally of the Federal Death Penalty Resource Project has also presented the Department with data asserting that "since 1988 there have been 133 defendants against whom the Attorney Generals have personally authorized a capital prosecution, 78 (59%) have been African-American, 32 (24%) have been Caucasian, 17 (13%) have been Hispanic, and six (4%) have been Asian or Indian." Affidavit of Kevin McNally (Oct. 4, 1998), filed in *United States v. Holloway*, No. 3:96-00004 (M.D. Tenn.) (on file with the author). Because the Department knows these facts and still continues to authorize federal death penalty prosecutions, it obviously does not consider them to present a *disabling* "pattern or practice" of racial discrimination in the administration of the federal penalty. The *Holloway* court also rejected the data as a basis for discovery or dismissal. See *Holloway*, *supra*, Mem. Op. Dec. 3, 1998. The author believes that the Department is presently studying this issue and the protocol language that addresses the topic.

347. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080. In addition, in a document that accompanies the blank death penalty evaluation form entitled "Non-Decisional Case Identifying Information," the Department again advises federal prosecutors that "[a]s is true for all federal prosecutions regarding prosecution, bias for or against an individual based upon characteristics such as race, color, national origin, or sex of a defendant or a victim may not play any role in the decision whether to seek or authorize the death penalty, and any influence of passion, prejudice, or other arbitrary factors must be avoided." *Id.* at n.1. See *infra* note 349.

tion information regarding the defendant or victim(s).³⁴⁸ Yet the Department as an institution does not ignore race; rather it collects race-identification information about capital defendants and victims (which obviously might be valuable for future study of federal death penalty administration) on a separate form, while instructing U.S. Attorneys that the information "will not be included in the materials presented to the Attorney General's Review Committee."³⁴⁹ Main Justice staff also reviews the materials that are submitted to the Committee to ensure that unnecessary racial information does not slip in. So, unless the defense informs the Committee, as they sometimes do for strategic reasons, or some fact necessary to the prosecution suggests ethnicity, the Attorney General and her review committee remain ignorant of race or ethnicity.³⁵⁰ This is a further indication of the Department's sensitivity to race issues in administration of the death penalty. While the Department maintains useful statistical information about race as it is intertwined with administration of the federal death penalty (although it has not publicly released this data), it self-consciously eliminates racial information from the Attorney General's review process.

After the Review Committee has considered the case, it makes a written recommendation directly to the Attorney General, who makes the "final decision" whether to file the statutorily required "Notice of Intention to Seek the Death Penalty."³⁵¹ The protocols also provide, however, that the Committee can revisit a capital case upon request, and will review "any submission defense counsel

348. The author must vouch for this from his personal experience. See *supra* note 321. See also CRIMINAL RESOURCE MANUAL, *supra* note 326, at 74 (requiring race of capital defendant and victim data from U.S. Attorneys, and noting that "[t]his page will not be included in the materials presented to the Attorney General's Review Committee, but will be . . . retained").

349. CRIMINAL RESOURCE MANUAL, *supra* note 326, at 74-7, "Non-Decisional Case Identifying Information" form.

350. For example, a Death Penalty Evaluation memo might say that "Defendant was indicted under RICO as the leader of the Latin Kings" or "Defendant's name is [seemingly ethnic]." However, unless ethnicity is stated directly (which it is not), the Committee knows that "seemingly ethnic" clues can lead to inaccurate inferences. That is, the Latin Kings may have non-Latino members, and names that supposedly suggest ethnicity can be completely misleading. Thus the elimination of direct racial information is a relatively effective measure.

351. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.050; see 18 U.S.C. § 3593(a) (1994). The Committee is supposed to give its written recommendation to the Attorney General within 15 days of receiving all necessary documents. *Id.* § 9-10.050. There is no requirement that the Committee be unanimous in its recommendation.

chooses to make," even at later stages in the case.³⁵² In that circumstance, the Committee again will make a recommendation to the Attorney General.³⁵³ There is no requirement, however, that the Attorney General formally issue a second decision in such a case.

The protocols require the U.S. Attorney to notify the family of the victim of all "final decisions" regarding the death penalty.³⁵⁴ In practice, because family members are often necessary government witnesses, and also out of concern for victims' families, family members are often consulted regarding the process as it goes on.³⁵⁵ On the other hand, security concerns and concern for deliberative confidentiality may necessarily limit the information that can be shared with victims' families in some circumstances.

In one of the protocols' more opaque but important sections, the Department suggests (but does not mandate) that a federal indictment should be returned in a potential death penalty case only when the "Federal interest in the prosecution is more substantial than the interests of the State or local authorities."³⁵⁶ This provision implicitly recognizes that murder is a crime in every state, so that many federally indictable murders are "dual jurisdiction" crimes, that is, prosecutable by state authorities as well as federal.³⁵⁷ The normal presumption is that federal authorities will not prosecute *in addition to* a state prosecution³⁵⁸ — but still a decision must often be made as to which jurisdiction will prosecute in the first instance.³⁵⁹ In other words, will the U.S. Attorney's office prosecute a potential capital case over which there is dual jurisdiction, or will it defer to a local prosecution?

This "substantial federal interest" provision also implicitly acknowledges that the federal death penalty applies even in states

352. *Id.* § 9-10.050.

353. *Id.*

354. *Id.* § 9-10.060.

355. See Pub. L. No. 97-291, § 6, 96 Stat. 1248 (1982) (the Victim and Witness Protection Act"), reprinted in 18 U.S.C.A. § 1512, Historical Note (West 1984).

356. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070 (stating that "[i]t is anticipated that" this will be so).

357. See Little, *Myths and Principles of Federalization*, *supra* note 68, at 1073 n.212 (noting that even murder of the President could be charged in state courts and in fact did not become a federal offense until after President Kennedy was assassinated in 1963). Locations over which federal authorities have *exclusive* jurisdiction to prosecute include federal enclaves such as military bases and federal parklands, and the high seas.

358. See *infra* notes 363-64 and accompanying text.

359. See generally Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997) (analyzing federal case selection policies).

that do not authorize the death penalty, and recognizes that some persons might advocate federal prosecution in a non-capital punishment state simply to obtain a death sentence. The protocols expressly direct that such penalty-driven decisions to file federal charges are inappropriate: "the fact that the maximum Federal penalty is death [where the relevant state's maximum penalty is not] is insufficient, standing alone, to show a more substantial interest in Federal prosecution."³⁶⁰ The "substantial federal interest" section then goes on to list three general factors (which are "not . . . exhaustive") that "may be considered" in deciding whether the federal interest in prosecuting a particular case is more substantial than the state's: (1) the strength of the state's interest in prosecuting the case; (2) the extent that the criminal activity or its impact extended beyond the state's borders;³⁶¹ and (3) the "likelihood of effective prosecution" in federal versus state courts (which may well have different procedural or evidentiary rules, jury pools, resources and venues, etc).³⁶²

The "substantial federal interests" section of the death penalty protocols plainly envisions that federal authorities will defer to state authorities in many homicide prosecutions, implicitly relying on the Department's *Petite* policy not to duplicate state prosecutions even though dual state-federal jurisdiction is constitutionally available.³⁶³ Named for the Supreme Court case in which it was first announced, the Department's *Petite* policy directs that, in dual jurisdiction cases, "federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate *single* forum in which to proceed."³⁶⁴ The Department's death penalty protocols are directly responsive to that policy. In

360. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070.

361. In particular, if evidence to effectively prosecute must be obtained from other states, the national subpoena authority of a federal grand jury is often a vital consideration in whether to indict at the federal level. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070B. Thus, for example, when a murdering kidnapper like Victor Feguer crosses state lines in the course of his offense, federal prosecution can often be more efficient from an evidentiary standpoint. See *supra* notes 27-38.

362. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070A-C. The Oklahoma City bombing case provides a good example of the overall federal interests out-weighting the interests of state prosecution. It involved destruction of a federal building, deaths of federal officials as well as other persons, interstate investigative and evidentiary needs and leads, a huge commitment of resources, and an available out-of-state venue (Denver) in which the highly-publicized and emotional case could be tried.

363. See *id.* § 9-2.031.

364. *Id.* § 9-2.031A (emphasis added); see *Petite v. United States*, 361 U.S. 529 (1960).

contrast, there is no requirement that state authorities must defer to a federal prosecution (although the high cost of capital prosecutions often counsel against a duplication of effort). For instance, in the Oklahoma City bombing case, state authorities filed a capital case against the defendants despite the fact that Timothy McVeigh was already subject to death in the federal case.³⁶⁵

Once a case is properly indicted and before it is submitted to the Attorney General for personal review, the protocols describe in general terms how the Committee should perform its analysis. Here it is necessary to diverge to note an important point about the federal prosecutor's role under the federal death penalty statutes.

The decision to authorize the filing of a death penalty notice merely permits the U.S. Attorney to place the issue of the death penalty before the jury. It is *not* the same as deciding to impose the death penalty itself. It properly remains the ultimate province of the jury, representatives of the community at large, to decide whether death should be imposed. Nevertheless, federal prosecutors cannot escape the difficult moral judgments necessary in capital prosecutions simply by claiming that they only "authorize," and do not impose, death.³⁶⁶ Aside from the obvious point that prosecutors are the gatekeepers for capital punishment by virtue of their charging discretion, the federal death penalty statutes themselves *require* federal prosecutors to come to a reasoned moral judgment before they file a death penalty notice.³⁶⁷

As explained above, the long battle to enact a general federal death penalty statute in 1994 yielded a compromise, not a draconian statute.³⁶⁸ Congress did not simply direct that a death penalty notice shall be filed whenever a death-eligible federal statute is charged. Rather, Congress wrote a more discretionary provision, which demands that before a death penalty option is placed before a federal jury, federal prosecutors must conclude that death is "jus-

365. See Steven Wilmsen & Kevin Simpson, *Death for McVeigh – Twelve Reach Their Decision in 11 Hours*, DENV. POST, June 14, 1997, at A1; Jo Thomas, *The Oklahoma City Bombing: The Verdict*, N.Y. TIMES, June 14, 1997, at A1; Robert Suro, *Decision May Become Benchmark in Capital Punishment Debate*, WASH. POST, June 14, 1997, at A10.

366. See Noonan, *supra* note 39, at 1023 (declaring that "the prosecutors' role imposes on them a part in the infliction of death").

367. As Justice O'Connor wrote in *California v. Brown*, 479 U.S. 538, 544 (1987), capital sentencing decisions "should reflect a reasoned *moral* response" to the defendant's background, character and crime.

368. See *supra* notes 206-225 and accompanying text. Indeed, some Congressional capital punishment supporters dissented from the FDPA legislation as finally written because they viewed it as too lenient. See *supra* note 219.

tified" as the appropriate penalty under the statute. Section 3593(a) directs that a federal death penalty notice shall be filed "[i]f . . . the attorney for the government *believes* that . . . a sentence of death is *justified*" under the statute.³⁶⁹ Thus federal prosecutors must apply all the balancing provisions of the statute and ultimately "believe" that the death penalty is "justified" before they proceed to seek it. Any lesser prosecutorial assertion, such as "death is 'arguably' appropriate under the statute so we should let the jury decide," is inconsistent with the statute that Congress wrote.

For this reason, the death penalty protocols direct both the U.S. Attorney and the Attorney General's review committee to perform the same statutory exercise that a federal capital jury must ultimately perform: determine what aggravating and mitigating factors are present and then decide whether the aggravating factors "sufficiently outweigh" any mitigating factors so as to "justify a sentence of death."³⁷⁰ The Department does not further constrain the discretion of its prosecutors in consideration of relevant factors: the protocols expressly direct that in making the final determination regarding whether it is "appropriate to seek the death penalty," all involved must consider "any legitimate law enforcement or prosecutorial reason which weighs for or against seeking the death penalty."³⁷¹

Nevertheless, as in the statute itself, the Department's review of specific aggravating and mitigating factors is tilted somewhat in the potential capital defendant's favor. The protocols direct reviewers to consider only aggravating factors that are supported by "sufficient admissible evidence" — sufficient not only to sustain the death penalty but "to sustain it on appeal" — and only those aggravating factors which they find supported "beyond a reasonable

369. 18 U.S.C. § 3593(a) (1994) (emphasis added). The statute does not expressly say "only" if, but the exclusionary intention of the congressional language may reasonably be implied under traditional rules of statutory construction. See *infra* note 426; see also *United States v. Roman*, 931 F. Supp. 960, 962-63 (D.R.I. 1996); *Nichols v. Reno*, 931 F. Supp. 748, 752 (D.Colo. 1996), *aff'd*, 124 F.3d 1376, 1378 (10th Cir. 1997). The CCE statute's triggering language is different. See *infra* notes 425, 469.

370. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080; *accord*, 18 U.S.C. § 3593(e) (1994).

371. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080. Thus, for example, while general deterrence is not mentioned within the federal statute, and some dispute it as a sensible rationale for the death penalty, it would not be illegitimate for the Department to consider it in some cases. See *Gregg*, 428 U.S. at 184-86 (discussing deterrence rationale).

doubt.”³⁷² In contrast, because the prosecutorial death penalty decision must be made at a relatively early stage when the defense case is likely to be undeveloped (as well as unrevealed), mitigating factors are (as in the statute) not held to such a high standard. Rather, the protocols direct that “any mitigating factor reasonably raised by the evidence should be considered in the light most favorable to the defendant.”³⁷³ In light of this process weighted somewhat in favor of mitigation, one would expect federal death penalties not to be authorized in all cases where it technically might be available. And indeed, as discussed below, this appears to be the case.

In keeping with the concept of centralized control over federal death penalty administration that the protocols represent, once a death penalty notice is authorized by the Attorney General, the protocols direct that any subsequent withdrawals of a death penalty notice that are *not* part of a plea bargain require explanation by the U.S. Attorney, review by the Review Committee, and approval by the Attorney General.³⁷⁴ But, in their final section, the protocols recognize that plea bargaining can occur in capital cases just as in any other. It is at this point that the complex relationship between the semi-autonomous Presidentially-appointed U.S. Attorneys and Main Justice produces an odd wrinkle in the otherwise centralized DOJ death penalty administration process.

Plea bargains that avoid the federal death penalty are treated differently from other decisions to withdraw death penalty notices once filed. By virtue of tradition, not law, U.S. Attorneys (who are appointed by the President and confirmed by the Senate) have always been granted almost complete autonomy in disposing of cases within their districts by plea negotiation.³⁷⁵ Thus, U.S. Attorney autonomy in plea bargaining controls in capital cases. Under the

372. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080.

373. *Id.*

374. *See id.* § 9-10.090.

375. Whether this policy should be so is a complex question bounded by deep historical traditions as well as political realities, and well beyond the scope of this Article. Over one hundred years ago, the Supreme Court made it clear that U.S. Attorneys are “placed under [the Attorney General’s] immediate direction and control.” *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-79 (1888). Nevertheless, U.S. Attorneys have traditionally operated with great independence, due in part to their political strength as Presidential appointees, nominated by their States’ Senators rather than directly appointed by the Attorney General. *See generally* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES 9 (1978); *id.* at 13, 16, 41-5, 98, 123; Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486-87 (1996) (noting a “strong history and culture of independence” for U.S. Attorneys).

protocols, United States Attorneys in the field may dispose of federal capital cases, once charged, without advance approval or review by the Attorney General or Main Justice.³⁷⁶

In discussing capital case plea bargaining, the protocols first direct that "[t]he death penalty may not be sought, and no attorney for the government may threaten to seek it, for the purpose of obtaining a more desirable negotiating position."³⁷⁷ This is consistent with the statutory direction that the federal prosecutor must sincerely "believe" that a death penalty is "justified" before seeking it.³⁷⁸ Thus the protocols direct that U.S. Attorneys must, before they negotiate any plea in a potential capital case, perform for themselves the same death penalty evaluation required by the protocols for Departmental approval.³⁷⁹ But once the U.S. Attorney has completed this evaluation within his or her own office, he or she can "approve any plea agreement" so long as it is consistent with general plea bargain principles found elsewhere in the *United States Attorneys' Manual*.³⁸⁰ The protocols could not be more clear on this point: although pleas in capital cases must be reported and explained to Main Justice by the U.S. Attorney after the fact, "there is no need for the United States Attorney to obtain prior authority from the Attorney General to approve a plea agreement."³⁸¹

One might imagine that a sensible U.S. Attorney would advise and consult with Main Justice in advance in any case, if he or she is considering a plea in a capital case, if for no other reason than to avoid the personal disfavor of Main Justice officials including the Attorney General.³⁸² Nevertheless, perhaps because avoiding a "fight" with Main Justice is more comfortable, many U.S. Attorneys that plead out capital cases do not report in advance. Moreover, consulting is quite different from being required to follow orders from Main Justice, and the explicit autonomy of U.S. Attorneys to forego the death penalty in a capital case plea bargain with-

376. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.100.

377. *Id.* This is consistent with various ethical authorities. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (ABA 1998) [hereinafter MODEL RULES] (prosecutors "shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); AMERICAN LAWYERS CODE OF CONDUCT Rule 9.5 (Revised Draft 1982) (prohibiting "unconscionable pressures" by prosecutors).

378. See *supra* note 369 and accompanying text.

379. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.100.

380. *Id.* (emphasis supplied); see *id.* § 9-16.000 (discussing general plea negotiation principles).

381. *Id.* § 9-10.100.

382. See EISENSTEIN, *supra* note 375, at 98.

out Main Justice approval is an exception to the Department's otherwise centralized authority in the capital arena. Thus, although the protocols appear to seek to bring within the purview of Main Justice all cases from all U.S. Attorneys' offices across the country "in which the death penalty may be sought,"³⁸³ even if the U.S. Attorney does not wish to seek it, they do not prevent the U.S. Attorney from unilaterally dispensing with the penalty by plea once the case is filed.

2. *A Personal Account of How the Death Penalty Review Committee Works*

Appointees to governmental positions can provide a valuable public service of public education by providing, after they leave their position, a responsible account of how the institution of which they were a part functions.³⁸⁴ However, an attorney's ethical obligation of confidentiality to former clients never terminates,³⁸⁵ and considerations of institutional and personal loyalty also provide prudent justification for avoiding "tell all" journalism.³⁸⁶ Confidentiality fosters candidness and wide-ranging debate in government; good government cannot function effectively if all is to be laid bare by fleeting occupants of institutional positions. Yet knowledge of how our governmental institutions work is valuable for informed public debate and in the effort to formulate sensible policy for the future. Thus principles of governmental confidentiality and public understanding of government can tug in different directions. Without breaching duties of confidentiality and with confidentiality and privacy concerns well in mind,³⁸⁷ the following

383. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.010.

384. See, e.g., EDWARD LAZARUS, *BEHIND CLOSED DOORS* (1998) (providing account of U.S. Supreme Court by former law clerk to Justice Blackmun); J. HARVIE WILKINSON, III, *SERVING JUSTICE* (1974) (same by former law clerk to Justice Powell); ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955) (providing a personal account by the former Solicitor General and Supreme Court Justice); Janet Napolitano, *Different Legal Worlds*, 21 *LITIG.* 27 (Summer 1995) (providing an account by U.S. Attorney of how that office functions).

385. See e.g., MODEL RULES, *supra* note 377, at Rule 1.9.

386. See Alex Kozinski, *Conduct Unbecoming*, 108 *YALE L.J.* 835 (1999) (criticizing CLOSED CHAMBERS, *supra* note 384, on this basis).

387. Cf. LAZARUS, *supra* note 384, at xi (referring to the need to be "careful to avoid disclosing [certain confidential] information"); WILKINSON, *supra* note 384, at xiii (stating that "[t]he need for such confidence . . . [is] important, and I have tried in every instance to respect it.").

personal account of how the Attorney General's Capital Case Review Committee has worked is provided.³⁸⁸

There was no formalized Main Justice review of potential federal death penalty cases until Attorney General Janet Reno established the Review Committee in January 1995. But for four years now, the Committee has theoretically reviewed every potentially death-eligible federal prosecution in the country, in order to advise the Attorney General about the decision and the reasons for either authorizing or not authorizing pursuit of a death sentence. The Committee creates written, although currently non-public, memoranda explaining its recommendations. In effect, this Committee has been acting as a national moderator of capital punishment for four years. Its written recommendations represent a developing body of "common law" precedent on the appropriate interpretation of, and standards for applying, the FDPA.

Due to her historic long tenure, Janet Reno has been the only Attorney General to utilize the Committee since it was created.³⁸⁹ This has allowed the Committee to operate with stability, which has been very useful in terms of solidifying successful practices. The Committee's operation is also shaped by Attorney General Reno's personal style, which, while serious, is also informal, candid, and open. Janet Reno's leadership has been essential to creating a centralized death penalty review system that works well within the bounds of Main Justice.³⁹⁰

The Committee's success is also due in part to the leadership of its only continuous member since 1995, Deputy Assistant Attorney General (Criminal Division) Kevin DiGregory. A former state

388. The author served on this Committee during 1996 and 1997. *See supra* notes 321-342 and accompanying text. This account is based on his recollection, which could be faulty, and his experience, which might have been unrepresentative and may be out of date. Moreover, some readers will find the account over-detailed. But because an account of how the Committee works has not previously been published, and because practitioners and judges may find the details useful in particular cases, the author has opted to include it.

389. As of February 1999, Janet Reno is the second longest-serving Attorney General in history, surpassing Homer Cummings who served five years and 10 months under Franklin Roosevelt (1933-39). *See* David Johnson, *Reno's Tenure Sets a Record this Century*, N.Y. TIMES, Jan. 11, 1999, at A14. Only William Wirt, who served under two different Presidents for 11 years during 1817-1829, has served longer. Wirt, however, did not receive a full-time salary and supplemented his income with outside legal clients. *See* Susan Law Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 DUKE L.J. 561, 619.

390. As discussed below, achieving an effective review that truly encompasses all potential capital cases in the field has been less successful. *See infra* Part II.B.

homicide prosecutor from Janet Reno's State's Attorney office in Florida, DiGregory brings to the Committee a vital practice perspective which few federal prosecutors have, in light of the absence of federal capital prosecutions for a quarter century. His experience, steady continuity, informal yet serious manner, and comfortable long-standing relationship with the Attorney General all serve to further the best interests of the Department in establishing a smoothly-running centralized capital punishment review system in an organization famous (or infamous) for the independence of its field offices.³⁹¹

The Review Committee operates informally, with no set schedule and with virtually immediate access to the Attorney General when necessary. The Committee itself may not agree unanimously in all cases, and the Attorney General often directs further study or investigation in close cases. Nevertheless, once the Committee has come to rest, Attorney General Reno generally follows its recommendations. This provides the Committee with confidence that its work is meaningful, and with a healthy sense of responsibility for its decisions.

As the process worked in 1996-97, cases were first submitted by the U.S. Attorney's office with venue over the offense to the Criminal Division, which then assigned each case to the particular "component" of Main Justice that had oversight responsibility for the particular federal statutes charged.³⁹² Thus, for example, an attorney in the Violent Crimes Section would help review a potential capital case charged under the car-jacking statute; the Organized Crime and Racketeering Section would handle a case charged under RICO; and the Civil Rights Division's Criminal Section would handle a civil rights homicide prosecution.³⁹³ The job of the Main Justice lawyer is to consult with the U.S. Attorney's office on all aspects of the case, including any perceived evidentiary gaps and any deadlines a district judge may have imposed for filing a death penalty notice,³⁹⁴ to ensure that all necessary paperwork and

391. See generally EISENSTEIN, *supra* note 375; MCGEE & DUFFY, *supra* note 13, at 14 ("The DOJ is a vast unruly kingdom" with "ninety-four autonomous fiefdoms lorded over by local U.S. Attorneys.").

392. As noted *supra* note 343, in late 1998, the Department formally established a Capital Cases Unit within its Criminal Division to advise in, and handle review of, all federal death penalty cases, thus eliminating the need to parcel out potential capital cases among various sections within Main Justice.

393. See CRIMINAL RESOURCE MANUAL, *supra* note 326.

394. Although the FDPA does not mention a deadline other than "a reasonable time before trial," 18 U.S.C. § 3593(a), some district judges have relied on their general supervisory authority to set filing deadlines for death penalty notices. In one case

exhibits have been provided by the U.S. Attorney's office and to seek additional information as necessary along the way. From 1996 through 1998, these diverse DOJ Sections and attorneys were coordinated for the Committee by an experienced attorney at Main Justice specifically assigned to the task. Specialized expertise and dedication to ensuring that submitted capital cases are "ripe" for the Attorney General's review is essential, and the excellent staff coordination has been invaluable to the Committee, whose members each have a multitude of other duties that compete for attention.

Cases are brought to the Review Committee's attention in two ways: either they are "ripe" for review, meaning that all necessary documentation has been received and the assigned Departmental attorneys are satisfied with the package; or there is an immediate need for attention because a court has set a deadline by which the Department must either file a death penalty notice under 18 U.S.C. § 3593(a) or forego seeking the death penalty.³⁹⁵ In either instance, the case comes with a package of paperwork: a Death Penalty Evaluation form and supporting documents sent by the submitting U.S. Attorney's office; a memorandum from the assigned Main Justice component; and a brief memo from the Committee's staff attorney summarizing the case and flagging possible issues or questions to be raised. U.S. Attorneys are required to provide a recommendation whether to seek the death penalty or not, and reasons for that recommendation.³⁹⁶ They may not remain agnostic on this ultimate question.

The U.S. Attorney's recommendation carries great, although not dispositive, weight with the Committee. This is particularly so when the recommendation is against seeking death in a death-eligible case. Such "no death" recommendations are almost always accepted, not just because of the traditional autonomy of the U.S. Attorneys, but also because U.S. Attorneys generally exercise great care in submitting their recommendations and are presumed to know their local communities, jury pools, judges, and the overall strengths and weaknesses of their particular case far better than Main Justice personnel. Nevertheless, a U.S. Attorney recommen-

a federal judge actually dismissed the government's death penalty notice as untimely, thereby barring a capital prosecution authorized by the Attorney General. *United States v. Rosado-Rosario*, 1998 U.S. Dist. LEXIS 673 (D.P.R. Jan. 15, 1998). There is no authority in the FDPA for such an action.

395. See *supra* note 394.

396. See CRIMINAL RESOURCE MANUAL, *supra* note 326, § VII (*Death Penalty Evaluation Forms*, "Recommendation of the United States Attorney").

dation against seeking the death penalty can be overridden by the Attorney General, and in at least one case a U.S. Attorney has been directed to file a death penalty notice despite the U.S. Attorney's recommendation against it.³⁹⁷

On the other hand, a recommendation from a U.S. Attorney in favor of seeking a death penalty receives somewhat less deference at Main Justice. Here is where the goal of national uniformity in administering the federal death penalty often outweighs the localized perspective of field offices. As the chart below indicates, the Attorney General has approved the death penalty in only a third of the cases submitted for Main Justice review.³⁹⁸ While the Department has not yet publicly released the substance of U.S. Attorney recommendations in individual cases, it was the author's experience that more cases submitted for review recommended seeking the penalty than against it. The Committee's job is to review such cases on at least two levels: (1) does the case itself present facts and circumstances that "justify" a death penalty, and (2) how does the case compare to other cases in which the death penalty previously has been recommended but not authorized? Some cases fall out of the approval range after the first inquiry while others, technically "death-eligible," nevertheless fall out when compared to other, non-approved cases.

When the Committee members have received all necessary paperwork, preliminary discussion may occur among the members informally, sometimes with less than the entire Committee, and

397. That case, however, was resolved after the Attorney General directed the U.S. Attorney to file a death penalty notice, by a plea bargain that waived the potential death penalty. This is the one stage of a federal capital case in which the U.S. Attorney may act without the approval of the Attorney General. See *supra* notes 374-383. Plea negotiations and the rationales of the parties involved are generally strictly confidential. But many prosecutors believe that resolution of a potential capital case by plea, so that risk of acquittal as well as expensive years of appeals are avoided, is almost always in the public interest, at least where there is any plausible mitigating factor in play. This is exemplified by the "UnaBomer" case, where a guilty plea to life imprisonment was accepted. See *United States v. Kaczyinski*, No. CR-S-96-259-GEB (E.D.Cal. 1998); see also *The Kaczyinski Plea*, WASH. POST, Jan. 24, 1998, at A24 (editorial praising the plea bargain, noting that trial would have "set up sticky appellate questions," and noting defendant's diagnosis of mental illness); Tamala M. Edwards, *Crazy Is as Crazy Does: Why the Unabomber Agreed to Trade a Guilty Plea for a Life Sentence?*, TIME, Feb. 2, 1998 at 66 (same). On the other hand, in *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (affirming death sentence in the bombing of federal building taking 168 lives), no guilty plea likely would have been accepted by the DOJ despite the high costs of pursuing a trial and other possible mitigating factors. See *supra* notes 41-44.

398. See *infra* chart at p. 429.

often more than once. Also, by this time, the staff attorney has scheduled the defense attorney presentation to the Committee.

By the time a case comes before the Review Committee, the defense position is often known, because the protocols encourage U.S. Attorneys to consult with defense counsel prior to submitting the case to Main Justice and U.S. Attorneys know that the defense will be given an opportunity to make a presentation to the Main Justice review committee.³⁹⁹ Anticipating this, the U.S. Attorney's memo will often explain the defense position and include some rebuttal. However, neither the U.S. Attorney nor Main Justice is required to tell defense counsel what the U.S. Attorney has recommended. Only the Attorney General can make a final decision regarding the federal death penalty, and all recommendations before her decision are necessarily tentative. Moreover, a U.S. Attorney's recommendation, in either direction, can be used adversely to the government's interests if disclosed.⁴⁰⁰ Consequently, although it may be obvious in some cases which way the U.S. Attorney or the Committee is "leaning," and in some cases U.S. Attorneys have already told defense counsel which way they have recommended, it can also be true that defense counsel are in the dark when they make a presentation to the Review Committee.⁴⁰¹

In the author's experience, virtually every case submitted for review was accompanied by an in-person presentation by defense counsel. Usually more than one lawyer appeared for the defendant, and often a "specialist" in the emerging field of federal capital

399. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.030 (noting that U.S. Attorney "should" give defense counsel opportunity to present mitigating factors). The protocols direct that defense counsel "shall" be provided an opportunity to present to the Review Committee, orally or in writing, reasons for not seeking the death penalty. See *id.* § 9-10.050.

400. If a U.S. Attorney reveals that she or he has recommended death but then that recommendation is not approved by the Attorney General, adverse publicity can be generated in the U.S. Attorney's home district. Conversely, if a U.S. Attorney's no-death penalty recommendation were revealed but then not accepted by the Attorney General, there could be adverse consequences in the subsequent prosecution. Thus it can be in the U.S. Attorney's interest to remain silent regarding the substance of any recommendation.

401. If this is so, then an awkward, somewhat ritualistic meeting can sometimes occur in a case where the Committee members are already predisposed to recommend against the death penalty. If the defense counsel lacks this knowledge, she or he must seriously accept the possibility of a death recommendation and thus must make a full-blown presentation against death. In such instances, defense counsel must be somewhat disconcerted by the Committee's seemingly blank reception of their arguments.

defense was present.⁴⁰² In addition to defense counsel, the meeting is usually attended by all members of the Review Committee, the Committee's staff attorney, and representatives of the relevant U.S. Attorney's office, including on occasion the U.S. Attorney him or herself, as well as one or two attorneys from the assigned Main Justice component and possibly even a federal law enforcement investigator. As such, there could be up to a dozen people seated around the Criminal Division's conference table for the defense presentation.

Capital defense counsel are ambivalent about the utility of making presentations to the Review Committee, and they understandably tend to view the opportunity largely in strategic terms. In a case where a death penalty authorization seems overwhelmingly likely, for example in the *UnaBomer* or *Oklahoma City* cases, it makes little sense to "tip one's hand" regarding potential defense arguments (on guilt or in mitigation of sentence) in advance of trial. In such cases, the meeting might instead be used by the defense to gauge the Department's own approach and possibly gain some "free" discovery about the government's case. Departmental personnel are aware of this possible use, however, so that in such clear-cut cases they are likely to be extremely guarded as well.

On the other hand, where there seems to be a genuine possibility of avoiding a death penalty authorization, defense counsel seem to feel that a serious Main Justice presentation is worth the effort as well as the possible sacrifice of some strategic advantage.⁴⁰³ This becomes increasingly true as the Review Committee's independence (i.e., willingness to reject a U.S. Attorney recommendation of the death penalty) becomes known within the small federal death penalty defense bar. Finally, even in cases in which a death-eligible offense is charged but the filing of a death penalty notice seems unlikely, defense counsel generally choose to err on the side of making a serious presentation. Thus, in the large majority of

402. See 18 U.S.C. § 3005 (1998) (federal capital defendants entitled to at least two appointed attorneys). Lawyers who have developed expertise from handling a number of federal cases in this area include: David Bruck of South Carolina; Kevin McNally of Kentucky; Richard Burr of Texas; and David Ruhnke of New Jersey.

403. The effort required of defense counsel can be considerable. It requires preparing an evidentiary package of some kind, an explanatory memorandum, and a one or two-day trip to Washington D.C. Not only does preparation of the documents require defense attorney time and energy, but some case-specific investigation must be done as well. Moreover, disclosing this investigation to the prosecution always comes at some strategic risk.

cases presented for review, a defense presentation lasting from forty-five to ninety minutes generally occurs at Main Justice.

No formal record is kept of those meetings: no court reporter, tape recording, or even minutes. They are "driven" by defense counsel who, after brief introductions and welcome, are asked to make whatever presentation they like. Members of the Committee generally ask some questions, sometimes specifically factual, sometimes more generally legal or even philosophical (for example, when is one defendant "equally culpable" to another?; what really makes a homicide "especially heinous"?⁴⁰⁴). Like judges' questions at appellate argument, these questions may or may not reveal the Committee members' actual predilections about the case.⁴⁰⁵ However, in the author's experience, Deputy Assistant Attorney General DiGregory, who usually chaired the defense presentation meetings, routinely and candidly informed the parties (both government and defense) about strengths and weaknesses that the Committee perceived as relevant to the death penalty determination.

Arguments made to the Committee are generally a mix of fact and law. Some cases are intensely factual, and it emerges that the defense has a very different vision of the facts from the U.S. Attorney's office, both as to the offense and as to the defendant's background. Occasionally, the defense will reveal new facts, such as a psychological examination or records of the defendant showing mental illness.⁴⁰⁶ Such fact-based arguments often create the need for more fact investigation prior to Committee decision. Other defense presentations may be largely legal; for example, arguing that a statutory factor should be interpreted as to not encompass the defendant's case. Again, such presentations may cause the Committee to do more work and research before deciding. Both sorts of presentations were, in the author's experience, effective.

The Review Committee does not formally "vote" after a defense presentation. More likely, the members will informally discuss the

404. See 18 U.S.C. § 3592(a)(4), (c)(6) (1998).

405. See, e.g., Paul R. Michel, *Effective Appellate Advocacy*, 24 LITIG. 19, 22 (1998). For example, where the Committee is already inclined to recommend against the death penalty, but defense counsel attempts to "oversell" the defendant's case, questions might be asked to correct any misimpressions. In other instances, questions might be asked to flesh out proffered mitigating factors, despite the committee member's leaning toward recommending the death penalty.

406. See 18 U.S.C. § 3592(a)(1) (1998) (providing that a significantly impaired "capacity to appreciate the wrongfulness of . . . conduct or to conform conduct to the requirements of law" is a statutorily-recognized mitigating factor "regardless of whether the capacity was so impaired as to constitute a defense").

case, determine whether some further information would be helpful, and ask the staff attorney to follow up before preparing a draft recommendation memo for the Attorney General. In most cases, a consensus regarding the appropriate recommendation quickly emerges. In others, more study and deliberation are necessary.

The Committee's recommendation to the Attorney General need not be unanimous, neither in result nor in rationale. That is, although all members might agree that the death penalty should not be recommended in a particular case, they might reach that conclusion for different reasons. For example, one member may find no aggravators proven at all, while others do find aggravators present yet believe they do not substantially outweigh strong mitigating factors. Articulation of rationale is important, as the recommendation to the Attorney General is made in writing and she needs to understand her Committee's reasoning. Significant differences in viewpoints among Committee members, while not frequent, are usually specified in the memo for the Attorney General.

When the memo is satisfactory to all members, it is delivered to the Attorney General and an in-person meeting is scheduled with her save in those rare cases where an immediate deadline exists. These meetings, while generally brief, are candid and unrushed. Difficulties in the case and any significant viewpoint differences are often discussed. On occasion, the Attorney General directs the Committee to seek more information or perform further legal analysis. More often, however, she briefly explains her decision and signs a form that authorizes the U.S. Attorney to file a death penalty notice, or not.

Serving on or in connection with the DOJ's death penalty review committee is a sobering experience, and one that is entirely new for most federal prosecutors.⁴⁰⁷ Approving the filing of a death penalty notice is as close as a prosecutor comes to actually imposing the penalty without personally trying the case or serving as juror.⁴⁰⁸ The role is, of course, different from a capital juror's, in that the federal prosecutor merely places the penalty before the jury, and in this sense allows the community finally to decide whether death is appropriate. Nevertheless, the Committee members must

407. Few federal prosecutors have relevant homicide trial experience, although since the federal death penalty became a general possibility in 1994, experienced homicide attorneys from state prosecution offices have increasingly been sought out to join U.S. Attorneys' offices. Most recently, experienced state homicide prosecutors have been hired to staff the Department's new Capital Cases Unit.

408. Even the judge has less discretion under the federal scheme. *See generally* 18 U.S.C. § 3594 (1994).

perform the same ultimate weighing exercise that the jury must perform, generally with less information and yet possibly with the same result.⁴⁰⁹ In contrast, a decision not to authorize a death penalty notice will entirely end that possibility.

Thus the Committee, and the Attorney General, take quite seriously the responsibility of administering a national system of capital punishment fairly and without bias, and with some degree of uniformity among similar cases coming from different regions of the country. The sense of moral responsibility for the defendant's life is palpable — but so too is the moral responsibility for victims and the unavoidable obligation to “faithfully execute” the statutory federal death penalty provisions that Congress enacted and the President signed.⁴¹⁰ Personal beliefs regarding capital punishment have no place in this balance, although there is no doubt that Attorney General Reno (as well as the statute) would permit a federal prosecutor opposed to capital punishment to “opt out” of a death penalty case.⁴¹¹ In my opinion, the DOJ's Capital Case Review Committee conducts its business responsibly, thoroughly, expeditiously and fairly.

3. *Results of the DOJ Death Penalty Review Process*

The DOJ has not publicly released much of the data it possesses regarding its administration of the federal death penalty over the past decade.⁴¹² Conclusions drawn about the process from the limited data provided are, therefore, necessarily hypothetical and likely imperfect. The Department could add useful knowledge to the continuing debate about capital punishment if it were to permit a more complete study of the data it possesses.

409. See *supra* notes 366-370 and accompanying text.

410. See U.S. CONST. art. II, § 3 (the Executive “shall take Care that the Laws be faithfully executed”); See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 380, n. 129 (1996) (suggesting that the constitutional duty to faithfully execute the laws carries with it ethical obligations).

411. See 18 U.S.C. § 3597 (b) (1994) (“No employee of . . . the United States Department of Justice . . . shall be required . . . to participate in any prosecution” of a federal capital case.”).

412. For example, while we know how many cases have been submitted for Main Justice review during that time, see chart *infra* p. 429, the Department has not yet released racial or ethnic data regarding this group, nor have they released the initial U.S. Attorney recommendations in the cases or the facts of the specific cases not authorized compared to those that have been authorized.

Nevertheless, the Department has released general data regarding the results of its centralized authorization process.⁴¹³ Below is a chart revealing the authorization results for all the potential federal capital defendants reviewed by the Attorneys General from 1990 through 1998. It therefore includes some pre-protocol cases, pre-FDPA cases, and twenty-one pre-Janet Reno defendants.

Fiscal Year of Decision	Number of defendants reviewed	Not Authorized	Authorized
1990	2	0	2
1991	6	0	6
1992	10	1	9
1993	19	10	9
1994	7	0	7
1995	28	10	18
1996	56	40	16
1997	124	100	24
1998	166	122	44
Total	418	283	135

The first point to note is the continuing increase in the number of cases being reviewed over the last four years. This probably represents the U.S. Attorneys' and the DOJ's increasing familiarity with the new federal death penalty statutes and the Attorney General's capital case review system. The related increase in death penalty authorizations also suggests that the number of federal defendants actually receiving death penalties is likely to increase significantly in the coming years.

The figures also demonstrate that a little more than two-thirds of the time (283 out of 418), the Attorney General has not authorized pursuing the death penalty in cases submitted by U.S. Attorneys for review. If one assumes that U.S. Attorneys recommend death more often than not in the cases they submit for review,⁴¹⁴ and that the Attorney General usually follows her Review Committee's recommendations, then it can fairly be said that the Main Justice Re-

413. This information was provided for this Article by the Department in writing (copy on file with the author).

414. See discussion *infra* notes 512-529 (discussing U.S. Attorneys' discretion in whether to submit cases for review). Not only is this an assumption, but it may be less accurate over time, as U.S. Attorneys develop a "feel" for the sorts of aggravated cases likely to be authorized. See *infra* Part II.D.

view Committee acts relatively independently when deciding whether to recommend death penalty prosecutions. That is, the Committee rejects U.S. Attorney death penalty recommendations with some frequency.

Moreover, if one assumes that U.S. Attorneys typically submit for review cases that they sincerely believe merit the death penalty, and that the Review Committee just as sincerely attempts to "rank" submitted cases and authorize the death penalty (or not) with rough consistency across geographic boundaries, then it might fairly be suggested that, as a general matter, the Review Committee's approval recommendations are made in the most aggravated murder cases that are submitted. In other words, of all the federal murder cases submitted for possible death penalty prosecution, the DOJ's Review Committee is approving pursuit of capital punishment in the relatively "high end" homicides that plainly merit consideration of death as a potential sentence under the statutory scheme.⁴¹⁵ Of course, without more specific public information regarding the 418 cases that have been reviewed since 1990, the foregoing suggestions could be characterized as largely unsupported speculation. However, they are not inconsistent with the author's seven-month experience as a member of the Review Committee.

Another aspect of the data provided by the Department relates to the final disposition of defendants authorized by the Attorney General for death penalty prosecution. As of December 31, 1998, 135 defendants had been authorized for pursuit of the death penalty since 1990. As the chart below indicates, only twenty of the 135 have actually been sentenced to death (although another thirty-two authorized defendants were awaiting trial and one is awaiting resentencing).

Thus, only 15% of the 135 federal defendants approved for capital prosecution by January 1999 (and less than 5% of the 418 defendants submitted to the Department for review by that date) have actually received a death sentence. The percentage of death-eligible federal defendants actually sentenced to death is even smaller if one assumes that not all potential death cases are being sent to

415. See *McCleskey*, 481 U.S. at 325, n. 2 (1987) (stating Baldus' study divided homicides into eight categories of seriousness, the eighth of which involved cases with aggravating factors "so extreme" that only one outcome is appropriate).

**Disposition of AG-Authorized Federal Capital Defendants
(as of December 31, 1998)**

<i>Received Death Penalty</i>	20
<i>Awaiting disposition</i>	33 ⁴¹⁶
<i>Guilty Plea with no death sentence</i>	43
<i>Convicted but no death recommendation</i>	29
<i>Acquitted of capital charges</i>	4
<i>Death penalty notice dismissed by court as untimely</i>	3
<i>Capital charge dismissed by court</i>	1
<i>Murdered before trial</i>	1
<i>Committed suicide before trial</i>	1
Total	135

the Department for review.⁴¹⁷ These relatively small numbers compel that the question be asked: is the federal death penalty imposed on so few defendants out of the available death-eligible universe that Justice Stewart's "struck by lightning" constitutional analogy from *Furman* can be applied?⁴¹⁸ Federal courts so far have said no.⁴¹⁹

Also significant is that over one-third of the authorized defendants avoided death by pleading guilty—the one disposition for which Main Justice review is not required.⁴²⁰

4. *The Department's Discretion and Its Choice to Pursue
National Uniformity*

It is important to note two points regarding the DOJ's new role as administrator of the federal death penalty. First, Departmental lawyers rightfully exercise discretion in determining which cases deserve pursuit of federal capital punishment, because the statute that Congress enacted demands an initial exercise of prosecutorial discretion before the statute's capital procedures may be invoked. Second, although the new federal statutes do not demand national uniformity in administration of the federal death penalty, such a

416. One of the defendants is McCullah, who received a death sentence but had it vacated on appeal and is awaiting re-sentencing. See *supra* notes 205, 312 (describing the *McCullah* case).

417. See *infra* chart at note 558.

418. *Furman*, 408 U.S. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."). Cf. Steiker & Steiker, *supra* note 275, at 375 (noting that, two decades after *Gregg*, "thousands of murderers are death eligible, yet few receive death sentences and fewer still are executed," and asking whether this meets constitutional standards).

419. While the question is raised, answering it is well beyond the scope of this Article.

420. See *supra* notes 374-83.

legislative policy is strongly implied and the Department has expressly chosen to pursue at least a rough form of national, inter-District uniformity among similar death-eligible federal cases. The choice to pursue centralized uniformity is by no means compelled by the FDPA. Indeed, a contrary decision, to allow regionalized discretion to control all federal death penalty filings, is defensible on a number of grounds. The issue of "uniformity" raises complex and intriguing questions which, for purposes of this critique of the regime actually in force, have been put aside.⁴²¹ However, the Department's choice for uniformity is entirely consistent with the statute and with other expressions of congressional intent.

First, some more detail as to discretion.⁴²² Strong advocates of capital punishment might contend that a prosecutorial Capital Case Review Committee has no place in the federal statutory scheme; rather, a death penalty notice should simply be filed in every case in which a death-eligible federal offense is charged and a death has occurred.⁴²³ Of course, such a practice would be inconsistent with the long-standing experience of state prosecutors' of-

421. See *supra* note 21.

422. See also *supra* notes 366-370 and accompanying text.

423. It is important to note here a significant difference in charging requirements between most state and federal capital cases. Virtually all state statutes that authorize a death penalty are predicated on conviction for some common-law homicide offense. This has two consequences: first, in a pro-death penalty state, all crimes meeting the offense definition of a capital offense are death-eligible — whether a death sentence is actually imposed will turn on the exercise of discretion by various actors (prosecutor, jury, and judge); and second, when a state death penalty case is charged, an intentional or reckless killing is almost always an *element* of the crime charged. As such, the killing is treated as a fact that the jury must find at trial, and it must be proved beyond reasonable doubt. See *In re Winship*, 397 U.S. 358, 362 (1970).

The same is not necessarily true regarding most federal death-eligible crimes. Except for straight federal homicide cases, see, e.g., 18 U.S.C. § 1111 (1994), federal death penalty charges need not necessarily include a "death" element. That is, because the death penalty has been engrafted onto pre-existing federal offense statutes as part of the punishment sections, the additional necessary fact that can make a federal offense death-eligible — "if death results" — appears as a matter of literal language to be in the nature of a sentencing enhancement, rather than a statutory "element" of the crime. Thus, for example, a federal prosecutor theoretically can simply charge "car-jacking," and if the jury convicts on that charge, it is only later, at the sentencing stage, that the "death resulted" and accompanying *mens rea* factors that can result in the death penalty would become relevant. Thus, in stark contrast to common-law death penalty charging, (1) not every crime meeting the offense definition in a death-eligible federal statute is, in fact, death eligible; and (2) the "death resulted" allegation that is generally treated as an element in state capital proceedings need not, at least theoretically, be so treated in most federal capital proceedings. Instead, the fact of a killing might be treated as the ultimate "sentencing factor" in the federal system, found only after guilt is determined and by some lower standard of proof.

fices, where discretion among which cases to seek the death penalty is normally exercised.⁴²⁴ But the rationale for exercising prosecutorial discretion at the federal level is more than just “good practice.” Such discretion is, in fact, statutorily required under the 1994 FDDA.

The federal statute does not direct that a death penalty prosecution be commenced in “every eligible case.” Rather, the statute, a product of compromise between supporters and opponents of capital punishment, provides that a death penalty notice “shall” be filed by federal prosecutors “[i]f, in a [statutorily eligible] case . . . the attorney for the government *believes* that . . . a sentence of death is *justified* under this chapter”⁴²⁵ This manifestly directs that federal prosecutors engage in the evaluative process that Attorney General Reno’s protocols require — a sincere prosecutorial belief that death is “justified,” after applying the weighing structure of aggravating and mitigating factors enacted by Congress, is statutorily *required* before a federal death penalty prosecution can proceed.⁴²⁶

In fact, it is the DOJ’s policy to allege that “death resulted” in all federal death penalty indictments, and to treat the allegation as an element at trial. But while the arguments for such treatment appear strong, whether this is constitutionally required remains to be seen. As noted above, *supra* note 229, the Supreme Court has recently struggled with the constitutionality of what facts may properly be treated merely as “sentencing factors” rather than elements, and it has the issue before it again this Term. So far the Court has, by a 5-4 margin, rejected the view that all statutory sentencing enhancements must be treated as elements of the offense, although there may be a “fundamental fairness” exception. *See Monge v. California*, 118 S. Ct. 2246, 2250 (1998). Justice Stevens’ and Scalia’s dissenting concerns take on particular force when considered in the context of federal death penalty liability that might turn on significant findings not treated as “elements” of the federal crimes charged. *See id.* at 2253, 2255.

424. *See, e.g.,* Melanie Shaw, *Race Statistics and the Death Penalty*, 34 How. L.J. 503 (1991) (discussing state prosecutor office’s death penalty review committee).

425. 18 U.S.C. § 3593 (a) (1994) (emphasis added). The CCE statute’s language is different. *See infra* note 467. I would argue, however, that DOJ should not have separate standards for its death penalty decisions.

426. This reading of the statute assumes that the legislative “if” means “only if.” It is possible, though implausible, that one could read the statute differently. Although the statute *mandates* filing a death penalty notice if the prosecutor believes a death penalty is justified under the statute, one might argue that this does not literally prohibit the filing of a notice in other cases, but rather leaves federal prosecutors with discretion to file in every possible death-eligible case. Such a reading, however, does violence to the everyday meaning of the word “if,” which normally implies a condition of limitation that must be fulfilled before further activity can occur. *See, e.g., Northcutt v. McAllister*, 249 S.W. 398, 401 (Mo. 1923) (this meaning of “if” is “so well settled” that extrinsic evidence on the issue is prohibited); 20 WORDS AND PHRASES 35-43 (1959) (collecting cases). Moreover, the strained alternative reading leads to the absurd and unethical result that a federal prosecutor would be authorized to pur-

Second, as to the choice for national uniformity among federal districts. The statutory requirement for a sincere prosecutorial belief in "justification" does not further require centralized Main Justice review. That is, while an atomized administration of the federal death penalty statutes might seem unlikely to some, leaving U.S. Attorneys in charge of regionalized discretion within their Districts sounds like a reasonably arguable position. The terms of the statute do not forbid leaving to every individual "attorney for the government"⁴²⁷ the unreviewed discretion to determine whether seeking a death penalty in any particular case is "justified." This statute could be read, therefore, to permit leaving U.S. Attorneys with such discretion, dispensing with any centralized Main Justice review. Thus the requirement of Main Justice review for all potential federal death penalty cases in order to ensure "consistency" is undoubtedly a policy choice which (some might contend) needs to be defended.

This Article, however, seeks to present and critique the process *currently* in place. The Attorney General has chosen to pursue centralized uniformity, at least in rough degree, and this Article seeks to analyze *that* system and suggest ways to improve it. Thus this Article does not defend at length the Department's decision to pursue a goal of rough national uniformity, but rather accepts it as consistent with the statute and congressional intent, and not unreasonable. While one might possibly argue in favor of a federal death penalty regime that lacks national uniformity — one that would permit similar federal crimes and defendants to receive life or death dependant on the district and regionalized, cultural differences — that does not appear to be the statute Congress has enacted nor is it the stated policy of the Attorney General. After briefly discussing what "uniformity" might mean, and then noting

sue the death penalty in a case where she or he did *not* believe it to be justified. Such absurd results are to be avoided when construing seemingly clear statutory language. *See generally* *United States v. Ryan*, 284 U.S. 167, 175 (1931). Suffice it to say that no case authority or legislative history of which the author is aware supports the more discretionary alternative reading.

427. 18 U.S.C. § 3593(a) (1994). The phrase "attorney for the government" is a term of art, defined in Rule 54(c) of the Federal Rules of Criminal Procedure to encompass all attorneys who might be authorized to prosecute a case in federal court. The term has also been broadly defined by the Attorney General in 28 C.F.R. § 77.2(a) (1998). In October 1998 (in the course of effectively overruling the bulk of 28 C.F.R. part 77), Congress endorsed the Attorney General's definition and added independent counsels and their staff to it. *See* Section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Ethical Standards for Federal Prosecutors, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 28 U.S.C. § 530B (1998)).

four arguments that might support the Attorney General's choice, the remainder of this Article proceeds to critique the DOJ's existing capital punishment regime within the framework of its stated uniformity goal.

This Article can only begin to sketch the meaning of national capital sentencing uniformity.⁴²⁸ For present purposes, the term "uniformity" encompasses *substantive* consistency in results, as well as *procedural* uniformity. Moreover, only "rough" uniformity is possible.⁴²⁹ Thus "uniformity" has three components. First, it must, at a minimum, be administered according to nationally consistent procedures. The process of selecting, evaluating and prosecuting federal capital cases should be roughly the same in all districts. Second, it should not produce too many "aberrational" results: defendants with "similar histories, convicted of similar crimes, committed under similar circumstances,"⁴³⁰ should receive similar sentences. Death should not result for simple robbery murders in some Districts but never in others. Third, results need be only "roughly" consistent. Reasonable people and courts inevitably will disagree about the equivalency of homicide facts and criminals' backgrounds. Thus capital sentencing uniformity necessarily partakes a bit of the "I know it when I see it" school of evaluation.⁴³¹

With these general definitional principles in mind, this Article contends that reasonable arguments can be made that a non-uniform system federal capital punishment administration would be inconsistent with (1) Congressional intent; (2) prior DOJ practice; (3) sound management principles; and (4) the constitutional rationale of *Furman* itself.

First, the Federal Death Penalty Act contains no language to suggest that it should not be applied uniformly around the country. Rather, it appears to be written as a statute of nationwide, uniform application. It applies to every federal "defendant" without distinction, and governs the actions of all federal prosecutors — every "attorney for the government" — alike.⁴³²

428. See *supra* note 21.

429. See *Pully v. Harris*, 465 U.S. 37, 54 (1984) ("Any capital sentencing scheme may occasionally produce aberrational outcomes.").

430. *Koon v. United States*, 518 U.S. 81, 92 (1996) (quoting the Senate Report proposing the Sentencing Reform Act of 1984).

431. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart; J. concurring). See Paul Gewirtz, *On "I know it when I see it"*, 105 YALE L.J. 1023 (1996).

432. See 18 U.S.C. §§ 3591(a), 3593(a) (1994).

This reading is consistent with Congress's general expression of federal criminal sentencing policy. In 1984, Congress enacted the Sentencing Reform Act which endorsed a wholesale alteration of federal sentencing policies, from a system granting virtually unreviewed discretion to each federal judge around the country to a centralized system of sentencing rules promulgated by a Sentencing Commission located in Washington, D.C.⁴³³ In creating this centralized sentencing system, Congress stressed that one goal was to eliminate "unwarranted sentencing disparities" among similar cases and defendants across the country.⁴³⁴ Regional disparity in federal sentencing had been decried for years.⁴³⁵ In the Sentencing Reform Act, Congress embraced that criticism and directed that uniform federal sentencing guidelines be promulgated without regard to geography. Nothing in the more recent congressional death penalty legislation suggests that Congress has changed its intention to have federal criminal punishment administered uniformly for similar violations and violators of identical federal statutes.

In addition, during the six years prior to the 1994 enactment of the Federal Death Penalty Act, the *United States Attorneys' Manual* directed that all federal death penalty prosecutions had to be approved centrally by the Attorney General.⁴³⁶ In an area as controversial as the federal death penalty, Congress likely was aware of this requirement when it enacted the FDPA, and might therefore be presumed to have expected and intended uniform Main Justice administration.⁴³⁷ In fact, influential members of the Con-

433. Sentencing Reform Act, Pub. L. 98-473, 98 Stat. 1837 (1984). See *Koon*, 518 U.S. at 92 (referring to the "far-reaching changes in federal sentencing"); *Mistretta v. United States*, 488 U.S. 361, 366-69 (1989) (describing "sweeping reforms"); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L.REV. 1, 4-5 (1988).

434. 28 U.S.C. § 991(b)(1)(B). See *Koon*, 518 U.S. at 92 (noting Senate Report criticizing "an unjustifiably wide range of sentences" in "similar" cases); *Mistretta*, 488 U.S. at 366 (noting "[f]undamental and widespread dissatisfaction with . . . disparities"); Breyer, *supra* note 433, at 4 (stating that "Congress's second purpose was to reduce 'unjustifiably wide' sentencing disparity").

435. See, e.g., MARVIN R. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 10-11, 16-25 (1972) (discussing "the tragic state of disorder in our sentencing practices").

436. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.020.

437. Cf. *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981) (stating in a federal criminal case that "Congress is 'predominantly a lawyer's body,' and it is appropriate for us 'to assume that our elected representatives . . . know the law.' . . . [I]f anything is to be assumed . . . it is that Congress was aware of the . . . rule and legislated with it in mind") (discussing Supreme Court caselaw; citations omitted); see also *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979).

gress that enacted the FDPA expressed misgivings about race and other biases exhibited in various States' administration of the death penalty. In response, Janet Reno assured Senatorial questioners in her confirmation hearings that she would seek to have "procedures" in place that would "prevent disparate treatment."⁴³⁸ A promise of uniform DOJ treatment of death penalty cases thus could be said to be implicit in Janet Reno's confirmation. It might even have been crucial to some moderate members of Congress who voted to approve the FDPA later in that same Congress.⁴³⁹

Sound management principles also support the Attorney General's decision to enforce centralized Main Justice review of potential capital cases. A decentralized federal capital punishment system permitting over 4,000 federal prosecutors⁴⁴⁰ — or even just ninety-four separate U. S. Attorneys — to determine individually whether or not to invoke federal death penalty procedures, would seem extremely likely to produce different and conflicting interpretations of identical statutory language. Although courts, and ultimately the Supreme Court, could seek to settle such conflicts over time, in an area as important and sensitive as capital punishment, such a process is not the most efficient management decision.⁴⁴¹ Moreover, because much of the exercise of prosecutorial discretion is judicially unreviewed, courts would likely be unable to correct some conflicting prosecutorial interpretations of the federal statutes, or even know of them. As the executive officer charged with "faithfully executing" the federal death penalty laws, it is surely not irrational for the Attorney General to seek to regularize their exe-

438. RENO CONFIRMATION HEARINGS, *supra* note 214, at 102 (responding to Senator Cohen).

439. For example, Senator Cohen, who sought assurances from Ms. Reno on this matter at her confirmation, was a key Republican moderate in support of the federal death penalty. *See id.* at 106. Similarly, one can imagine that Senator Kennedy, long an opponent of capital punishment, might have had more trouble supporting the FDPA if he had believed that individual prosecutors in every state were going to have unreviewed discretion to seek the death penalty.

440. *See* Clymer, *supra* note 359, at 676 n.177 (noting that as of 1994 there were 4,099 federal prosecutors).

441. It must be noted, however, that the Attorney General does not require centralized review of many U.S. Attorney decisions, despite the likelihood of generating conflicting decisions. Yet increasingly, Main Justice review of important decisions, such as RICO or money-laundering indictments, is required. *See, e.g., UNITED STATES ATTORNEYS' MANUAL, supra* note 12, at §§ 9-105.100, 9-110.101. Given the constitutional view that "death is different" and significantly more important, the decision to isolate capital punishment for particularly intense Main Justice review does not seem unreasonable.

cution by opting for a centralized review system rather than one of disparate autonomy.⁴⁴²

Finally, a decentralized and regionally disparate system of federal capital punishment could run the risk of violating *Furman*'s prohibition of indiscriminate randomness in imposing the death penalty. Of course, one cannot know the result of such a system without trying it: perhaps all federal prosecutors would evaluate all potential death penalty cases in roughly the same way and reach roughly the same results across the country, so as to avoid the constitutional accusation that there is "no meaningful basis for distinguishing" death from non-death cases.⁴⁴³ Moreover, one can debate whether *Furman* and *Gregg* require substantive, or only procedural consistency.⁴⁴⁴ But the issue is not whether a decentralized process would necessarily be open to constitutional attack. Rather, it is that the Attorney General is empowered to avoid the experiment by continuing the pre-existing practice of centralized DOJ review for all potential federal death penalty cases. This choice is a reasonable one; it is neither insensible nor inconsistent with the statute's language and likely intent.⁴⁴⁵

Regardless of the merits of the choice, it seems clear that some form of rough national uniformity is a goal of the Attorney General and her capital punishment regulations. When confirmed, Janet Reno responded to questions about race and the death penalty by saying the Department "should do everything [it] can to prevent

442. Of course, courts can still arrive at conflicting interpretations and decisions even after the Attorney General has exercised some centralized review. Moreover, it is doubtful that more than "rough" uniformity can ever be achieved; lawyers and judges will always argue about what cases and results are truly "similar." The Attorney General is permitted to try, however, even if perfect uniformity is unattainable.

443. *Furman*, 408 U.S. at 238 (White, J. concurring)

444. A substantive uniformity argument based on *Furman* and *Gregg* is complex and would require far more development than is possible here. But those cases, as well as later ones, do contain suggestions that some rough substantive uniformity is required. Of course, they also contain contrary suggestions. See *Gregg*, 428 U.S. at 198 (Op. of Stewart, Powell, and Stevens, JJ.) (finding it significant that Georgia's Supreme Court "compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate [t]hese procedures seem to satisfy the concerns of *Furman*."); cf. *Pulley*, 465 U.S. at 54 (occasional "aberrational outcomes" are inevitable and appellate proportionality review not invariably constitutionally required, yet "major systematic defects [as] identified in *Furman*" might invalidate system). Further pursuit of these hints simply must await another day. See *supra* note 21.

445. See generally Kahan, *supra* note 375, at 489-90 (arguing that *Chevron* deference should apply to the DOJ, so that when a statute is silent or ambiguous, courts should defer to the Department's pre-existing, reasonable interpretations).

disparate treatment.”⁴⁴⁶ Ten months later, when the Attorney General issued the capital punishment review protocols, they expressly applied to “all Federal [capital] cases” without distinction,⁴⁴⁷ and they stated that “consistency” was a primary goal.⁴⁴⁸ Indeed, what other purpose could a national, centralized review of potential capital cases have, if not to produce at least rough uniformity among the Districts? And in fact, that was the ethic of the Review Committee when I served: Although every case is unique, to the extent possible we attempted to ensure that like cases were treated similarly, both procedurally and substantively, wherever they originated. In sum, it appears to be current DOJ policy that, as best as humanly possible, the federal death penalty be administered uniformly across the nation.

This Article does not argue that national uniformity in federal death penalty administration necessarily *should* be the goal of the DOJ. Rather, it accepts the Department’s and Congress’s statements that uniformity is their goal, and suggests some attention to DOJ policies in pursuit of their uniformity objective. It is a separate question, not further addressed here, whether Congress could enact a regionally disparate federal death penalty system — for example, authorizing that the death penalty be available for federal crimes only in those federal districts whose States permit capital punishment. Congress has not enacted such a statute and the wide-ranging policy and constitutional issues provoked by the question can be left to another day.⁴⁴⁹ From this point on, this Article pro-

446. RENO CONFIRMATION HEARINGS, *supra* note 214, at 101; *accord* at 102.

447. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, § 9-10.010; *accord*, *id.* § 9-10.040 (referring to “all cases”).

448. *Id.* § 9-10.080 (stating that “[t]he authorization process is designed to promote consistency and fairness”).

449. *See supra* note 21. The Supreme Court has held that the principles of the Fourteenth Amendment’s equal protection clause also run against the federal government, via the due process clause of the Fifth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”); *United States v. Kras*, 409 U.S. 434, 446 (1973) (rejecting equal protection challenge to federal bankruptcy statute); *Bolling v. Sharpe*, 347 U.S. 497 (1954). The literal command of the Fifth Amendment — “nor shall any person be . . . deprived of life . . . without due process of law” — seems to encompass the imposition of the death penalty. If Congress were to enact a regionally “unequal” capital punishment scheme, questions such as what level of scrutiny applies, what governmental purposes are served, and whether the purposes are “rationally” (at a minimum) served by the statute would all have to be answered. *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1436-55 (2d ed. 1988). If equal protection analysis of federal statutes really is “the same as that under the Fourteenth Amendment,” then the language of the Fourteenth Amendment requiring equality within the jurisdiction of the sovereign entity might arguably require federal

ceeds within the framework of a goal of rough national uniformity as presently found in the statute, congressional intent, and the Attorney General's stated policy.

II. Administration of the Federal Death Penalty — Changing Roles and Some Remaining Challenges

The realistic availability of death penalty prosecutions on the federal level undoubtedly has changed the roles of some federal prosecutors. For many serious federal offenses, case-acceptance and charging policies must now take the penalty into account. Federal trial attorneys are now obliged to include consideration of strategic aspects unique to death penalty cases, and also to add the moral weight of possible death sentences to the responsibilities of prosecution in general. Responsibly administered, the role of a death penalty prosecutor should be one of the most difficult known to our profession.

On an institutional level, the DOJ has assumed a new and unprecedented policy-making role as a national death penalty administrator. The tasks of assembling and reviewing potential death penalty cases from around the country, interpreting and developing application standards for the Federal Death Penalty Act, and formulating consistent national prosecution policies for death penalty cases are new and challenging. The Attorney General has responded progressively to these challenges by requiring centralized review of potential federal death penalty cases, creating a high-level race-blind Capital Case Review Committee, and publishing some guidelines to ensure "consistency and fairness" in Main Justice review.⁴⁵⁰

Nonetheless, challenges remain. The discretion of federal prosecutors in the field is virtually unchecked regarding the selection, charging, and plea disposition of potential capital cases. Moreover, the unconscious influence of racial factors still has the potential to significantly affect federal death penalty administration.⁴⁵¹ Finally,

uniformity in the administration of capital punishment. See *Buckley*, 424 U.S. at 93; see also *supra* note 444 (discussing *Furman*, *Gregg*, and uniformity). As for Congressional policies, see 28 U.S.C. § 991(b)(1)(B) (1994) (stating the "purposes" of the U.S. Sentencing Commission include "avoiding unwarranted sentencing disparities among defendants"). But see 18 U.S.C. § 13(a) (1994) (assimilating, for purpose of undefined crimes committed on federal enclaves, not just state substantive criminal law but also state "punishment[s]" which may well differ nationally).

450. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, §§ 9-10.010 - 10.080.

451. See *infra* Part II.B.2. (developing the concept of "unconscious racial empathy"). Stephen Bright, an experienced death penalty critic, has accusatorily opined

indefinite statutory language requires self-conscious Main Justice interpretation and specification if semantic ambiguities are not to produce disuniformity. If fairness and consistency are seriously to be attempted on a national level, not just at Main Justice but also among ninety-four federal districts across the country, then it is time for the Department to take its new role as federal death penalty administrator to the next level and address these more difficult, discretionary issues.⁴⁵²

A. The Role of the Individual Federal Death Penalty Prosecutor

Before addressing Main Justice's role, the new role of individual federal prosecutors and their offices "in the field" in confronting potential capital cases should briefly be considered. Just as "death is different," so too is the role of an individual federal death penalty prosecutor different from the prosecutorial role in other types of criminal cases.

1. Declining, Selecting, and Charging Cases

Decisions to "decline" cases referred to U.S. Attorneys' offices, in favor of state and local prosecution, are made daily by federal

that "[t]he United States DOJ . . . is now one of the worst offenders in the discriminatory use of the death penalty." Stephen Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 466 (1995). This critique was based on early information regarding federal capital prosecutions under 21 U.S.C. § 848, and Bright may not fully appreciate the inevitably slow pace of change within an Executive Department as large and sprawling as the U.S. DOJ. See Bright, *supra* at 464. Moreover, he has come forward with no direct evidence of discriminatory purpose or intent; in light of various State-side issues, his accusation is at the very least overstated. Nevertheless, his critique and the statistical facts upon which it is based cannot be ignored.

452. This Article generally suggests measures that would provide Main Justice with greater review and control over federal death penalty administration. It should be noted that others have decried the trend toward "usurpation of the U.S. Attorneys' power by the DOJ and the Office of the Attorney General." Tom Rickhoff, *The U.S. Attorney: Fateful Powers Limited*, 28 ST. MARY'S L.J. 499, 503 (1997); see also 1998 JUDICIAL CONF. REPORT ON COSTS, *supra* note 246, at A-3, Recommendation 5 (stating that DOJ should "streamline" the Main Justice review process and adopt a "fast track" review for "cases . . . where there is a high-probability that the death penalty will not be sought"). It should be noted that the Judicial Conference's recommendation is not at all inconsistent with this Article's proposed system of a broader and nationally uniform federal capital review system. While more cases would come to Main Justice for review, "easy" cases could, and should, still be fast-tracked. Indeed, the more cases that Main Justice must review, the greater the need for an intelligent fast-track system.

prosecutors in the field.⁴⁵³ Now that the FDPA is in place, the realistic availability of capital punishment is a new factor that can affect the initial job of selecting which cases and what charges to file. Because many federal killings might also be charged as state murder, federal prosecutors initially have to decide which cases should be pursued federally, as opposed to deferring to a state prosecution. Prosecutors should be attuned to the effect that death penalty availability might have on their cases selection decisions.

The DOJ protocols state that the desire to obtain the death penalty cannot alone support accepting a case that otherwise would be deferred to the State.⁴⁵⁴ But they do not further address whether desire for a death penalty may play a role in the decision and, if so, what that role legitimately might be. The Department must be careful not to allow regional differences regarding the appropriateness of capital punishment substantively to distort its pursuit of roughly consistent results across the country. Yet regional differences may claim some legitimate role.⁴⁵⁵ Further detail is needed on this topic in the protocols.

In addition, the converse question should also be confronted: should a desire to *avoid* death penalty prosecutions lead a federal prosecutor to decline cases over which federal jurisdiction would otherwise be asserted? In real-world terms, for example, should a major narcotics prosecution be declined in an anti-death penalty state even if the prosecutor learns that the lead defendant has also killed a witness? The protocols do not provide an answer to this mirror-image question, although they may be read to suggest one. The protocols state that a federal death penalty case should not be filed unless the "Federal interest in the *prosecution*" clearly outweigh the State's interests.⁴⁵⁶ This suggests that the federal prosecutor's focus in selecting and declining cases should be on the interests in the "prosecution," not the penalty. One can of course debate whether a separate concept of "federal interest in the death penalty" can be intelligibly separated from the federal interests in

453. See Clymer, *supra* note 359, at 693-95 (describing the role and policies of federal case selection). Potential cases are "referred" to U.S. Attorneys by federal and state law enforcement agencies, and a case cannot be prosecuted unless and until it is accepted for federal prosecution by an attorney within the office. If a referral is "declined" for federal prosecution, it does not enter the official court statistics for that federal District. The efforts of law enforcement agencies to "sell" cases to federal prosecutors is a common and well-known event within all U.S. Attorney's offices.

454. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070.

455. See Sifton, *supra* note 21.

456. *Id.* § 9-10.070 (emphasis added).

prosecution. But if such a distinction can be made, then the DOJ protocols suggest that availability of the death penalty ought not play a role (or, at least, never a dispositive role) in the selection of cases in *either* direction.

On the other hand, one might read "interest in the prosecution" as encompassing factors related to the penalty, since in practice the availability of the death penalty is difficult to separate from the prosecution. The presence of a death penalty can have an impact on the chances for a successful presentation.⁴⁵⁷ If this reading is adopted, then federal prosecutors should attempt to develop a philosophy regarding what factors are appropriate in defining the "federal interest in seeking the death penalty," and how that interest should influence case acceptance policies. One might ask whether there are some types of potential federal cases where seeking the death penalty serves specific, articulable federal interests that would not be served, or not served as well, by deferring to state authorities.⁴⁵⁸ At present, development of such an overarching theory of federal death penalty administration is, at best, at a nascent stage within the DOJ. Until some national guidelines on such *substantive* issues are forthcoming from Main Justice,⁴⁵⁹ individual federal prosecutors should, at the very least, discuss the impact that an available death penalty should (or should not) have on their initial case-intake decisions, and attempt to develop unbiased and uniform standards within their individual offices for capital case referrals.⁴⁶⁰

The same is true, it would seem, regarding charging decisions. Once a U.S. Attorney's office has decided to accept a case, how to charge it can sometimes, although not always, present a choice between death-eligible and other felony charges. In other words, death-eligible federal offenses often reach conduct that might also

457. See *infra* notes 464-70.

458. My colleague, Professor William K.S. Wang, has stimulated me to consider whether one possibility might be the murder of federal officials. It can be argued that a specifically "federal" interest in deterring similar attacks on other federal officials is better served by seeking the death penalty federally, rather than consigning it to the discretionary protection of state prosecutors. This discussion of articulable and severable federal interests in capital prosecutions seems worthy of further concentration.

459. In general, the DOJ capital case protocols address only procedural administration of the federal death penalty and do not provide any substantive standards.

460. In other words, the choice regarding whether to accept or decline potential death penalty cases ought not be left to the absolute discretion of each individual prosecutor within a U.S. Attorney's Office. Instead, when an office receives a potential federal case that involves a killing, each office, at least, should apply some uniform standards and require supervisory oversight.

be charged under federal statutes that do not include a possible death penalty.⁴⁶¹ Although the *United States Attorneys' Manual* does contain a general "most serious offense" charging policy, that policy is somewhat vague and, more significantly, its implementation is normally not exposed to Main Justice review.⁴⁶² While the decision whether to file a death penalty notice when a death-eligible statute is charged does require Attorney General review under the protocols, the earlier decision of what statutes to charge in the first instance is analytically separate, and not reviewed. The issue of how to make charging choices in cases involving killings should be acknowledged and self-consciously confronted. Rather than leave penalty-dispositive charging choices to the unreviewed discretion of individual federal prosecutors, U.S. Attorneys' offices (as well as Main Justice) should seek to develop unbiased and uniform charging standards for all potentially death-eligible cases.⁴⁶³

Finally, experienced prosecutors candidly admit that media focus can influence prosecutorial decision-making, and that such pressures are often greatest in the capital context.⁴⁶⁴ Accordingly, federal prosecutors must anticipate the influence that intense media focus in capital cases can have on their behavior and the behavior

461. For example, in the witness tampering, fraud, or narcotics distribution contexts, some statutes encompassing the criminal conduct have not been amended to include a possible death penalty even "if death results." *Compare* 21 U.S.C. § 841(b)(1)(A) (death penalty is not available for large-scale distribution) *with* 21 U.S.C. § 848(e)(1) (declaring that the death penalty *is* available for large-scale distribution) *and* 18 U.S.C. § 3591(b) (same); *compare*, 18 U.S.C. § 1510 (1994) (death penalty is not available for "obstruction of criminal investigations") *with* 18 U.S.C. §§ 1503, 1512 (the death penalty *is* available for obstruction of justice and witness tampering). In contrast, in a case involving the murder of a federal officer, for example, a death-eligible statute would almost certainly have to be charged. *See generally* Clymer, *supra* note 359, at 697-705 (noting difference between federal case "selection" and "charging" policies).

462. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-27.300 ("Charging Most Serious Offenses"); *see also* DOJ Bluesheet 9.022 (Oct. 12, 1993) to "clarify" the most serious offense charging policy, *reprinted in* DEPT OF JUSTICE MANUAL, *supra* note 12, § 9-27.750B (stressing prosecutorial discretion but requiring that "charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied"). The "appropriate level of responsibility" is not defined; while it would seem to require some supervisory review within a U.S. Attorney's office, it does not extend back to Main Justice except in rare cases.

463. *Cf.* Clymer, *supra* note 359, at 716 (suggesting that federal cases in general should not be charged solely to "take advantage of" harsher federal sentencing policies).

464. *See, e.g.*, E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 669 (1996); Thomas Johnson, *When Prosecutors Seek the Death Penalty*, 22 AM. J. CRIM. L. 280, 280 (1994).

of others (witnesses, law enforcement officers, staff, etc.). In addition, they should attempt to guard against such external pressures influencing their selection, charging, strategic and case disposition decisions.

2. *Litigating Federal Death Penalty Cases*

Once a federal case has been charged as a death penalty case, strategic litigation issues arise for the individual federal prosecutor to consider. For example, in a case where the question of guilt beyond reasonable doubt on the substantive offense is evaluated to be close, adding a death penalty can increase the difficulty of persuading twelve jurors to convict. Even though capital jurors are told not to consider the possible penalty until the guilt phase has concluded,⁴⁶⁵ many prosecutors believe that the specter of a death penalty can increase the chances of a “hung” jury or acquittal on the issue of guilt in close cases. Media presence and scrutiny can also effect lawyers, jurors, witnesses and judges. A careful calculus must be performed, on evidentiary and strategic levels, to determine how best to absorb this potentially disturbing influence.

In contrast to the sympathetic effect that a death penalty might cause during the guilt/innocence stage of a close case is a concern about the effect that “death qualified” juries can create at the sentencing stage. The Supreme Court has approved excluding for cause in a capital trial all jurors who admit that their personal beliefs regarding the death penalty “would prevent or substantially impair” them from following the law regarding capital punishment.⁴⁶⁶ Many critics have argued that such “death qualified” juries are also more prone to convict.⁴⁶⁷ Nevertheless, the Supreme Court has ruled that the by-product of producing a “conviction

465. See, e.g., 1 EDWARD J. DEVITT, CHARLES B. BLACKMAR ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 10.01, (4th ed. 1992); 1 CALIFORNIA JURY INSTR., CRIMINAL, No. 8.83.2 (6th ed. 1996) (“Jury Must Not Consider Penalty”).

466. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); see *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Capital defendants also have the right to exclude jurors who say they would always impose the death penalty, regardless of mitigating factors — a “life-qualified” jury. *Morgan v. Illinois*, 504 U.S. 719 (1992). But whether this has a significant impact on prosecutorial strategy in potential capital cases (as does a “death qualified” jury) has not been the object of study. One imagines that jurors who say they would impose a death sentence regardless of the circumstances are much more rarely found.

467. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 169-70 nn.4-6 (1986) (collecting authorities); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1114 n.19 (1997) (collecting authorities); Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1177 (1973).

prone" jury poses no constitutional bar to excluding jurors who cannot follow the law.⁴⁶⁸

Critics contend that some strategic prosecutors may charge a case as death-eligible merely to obtain a conviction-prone jury, not truly believing the case to deserve, or to be likely to receive, a death sentence.⁴⁶⁹ While such prosecutorial manipulation seems manifestly unethical, it is also violative of the federal death penalty statute itself. The FDPA provides that only a prosecutor who "believes that . . . a sentence of death is justified" may file a death penalty notice invoking the FDPA's special procedures.⁴⁷⁰ Responsible federal prosecutors must take pains to ensure that their deep desire to "win" does not, even subconsciously, lead them to strategically manipulate death penalty charges.⁴⁷¹ Federal prosecutors are expressly prohibited under the FDPA from manipulating death penalty notice filings merely to obtain "death qualified" juries.

Once a notice is filed, federal prosecutors also should be attuned to the possibility of seeking Main Justice release from a previously-authorized death penalty in some cases. Although the protocols do not explicitly address the possibility, it is well accepted that prosecutors, just as defense counsel, may return to the Attorney General

468. *Lockhart*, 476 U.S. at 168-73 (assuming the "conviction prone" contention to be true although also criticizing the empirical data). Neither does this phenomena require that two separate juries be selected, one not death-qualified for the guilt phase, and another death-qualified for the sentencing phase, despite the fact that death qualification relates only to the second stage of capital trials. See *id.* at 180-82. A "unitary jury" system with bifurcated conviction and sentencing stages was upheld in *Gregg*, 428 U.S. at 160. The "conviction prone" argument had been noted, but not decided prior to *Gregg*, in *Witherspoon*, 391 U.S. 510, 520 n.18 (1968), and the "two jury" solution was advanced at length by Justice Marshall in dissent in *Lockhart*, 476 U.S. at 203-06, and again in *Buchanan v. Kentucky*, 483 U.S. 402, 426-31 (1987) (Marshall, J., dissenting).

469. White, *supra* note 467, at 1177; see Tina Rosenberg, *The Deadliest DA*, N.Y. TIMES MAG., July 16, 1995, at B1.

470. 18 U.S.C. § 3593(a) (1994). See *supra* notes 366-68, 425-426. Interestingly, the CCE statute does not contain this language, but rather appears to permits the prosecutor to file a death penalty notice "[w]henever the Government intends to seek the death penalty." 21 U.S.C. § 848(h) (1994). Nevertheless, federal prosecutors are still governed by ethical rules that forbid them from pursuing charges not supported by at least probable cause. See, e.g., MODEL RULES, *supra* note 377, Rule 3.8(a). See also *supra* note 425.

471. Of course, prosecutors actually "win" whenever justice is done, regardless of whether a conviction results. This can be difficult for any lawyer to remember in the heat of battle, however, and budgetary and political pressures to convict can be strong. The statutory prohibition, therefore, is important.

to revisit a death penalty authorization decision at any time.⁴⁷² The government's evidence can change, and get weaker, after an initial charging decision has been made, and trial attorneys should not feel disabled from revisiting the death penalty authorization decision.

Similarly, as with case declination and charging decisions,⁴⁷³ federal prosecutors should develop policies to regulate individualized plea bargaining in capital cases. While Attorney General approval is not required for plea dispositions in the death penalty context,⁴⁷⁴ neither should such dispositions be left to the individual, unreviewed discretion of line prosecutors. Particularly since the Attorney General has ceded this stage to the U.S. Attorneys, the U.S. Attorneys' offices should undertake to develop a philosophy of plea dispositions regarding capital cases.⁴⁷⁵ Office-wide policies should be openly discussed and circulated within an office, and supervisory review and approval should be required before any plea is offered, let alone agreed to. Aside from the beneficial local effect, if U.S. Attorneys undertake to self-consciously develop such guidelines and then show them to Main Justice, useful information and stimulus for development of DOJ policies will be generated. This in and of itself will be a benefit. Main Justice policy is generally best developed through individual field office initiatives, rather than by centralized thinking divorced from field concerns.

3. *Costs, Careful Attention, and Moral Implications*

Federal prosecutors must consider that death penalty cases usually take longer to get to trial, to try, and to finalize on appeal. Most estimates agree that the cost of carrying a capital case from indictment to execution far exceeds the total cost of a non-capital

472. The protocols implicitly recognize that a U.S. Attorney may sometimes seek to withdraw a death penalty after it has been filed, because the protocols expressly require Main Justice approval for any such withdrawal (unless it is part of a plea bargain). See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.090. The protocols also provide that the U.S. Attorney, as well as Main Justice, may consider "any legitimate law enforcement or prosecutorial reason" in evaluating the death penalty option. *Id.* § 9-10.080. Changes in the evidentiary mix before, or even during, trial would surely be legitimate reasons for reconsidering a death penalty.

473. See *supra* notes 451-462.

474. See *supra* notes 374-81.

475. See Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1126-27 (1998) ("[P]rosecution offices, in their internal guidelines or procedures, should set forth the[ir] plea-bargaining theory or theories.").

prosecution.⁴⁷⁶ In addition, the average capital defendant may sit on death row for years before the sentence is implemented.⁴⁷⁷ Federal prosecutors now have a responsibility to consider the impact of such costs and delays before engaging the process that invites them. While, on balance, a case like the Oklahoma City bombing case (with 168 persons killed) may obviously demand placing the death penalty option before the jury regardless of cost, other cases that still have egregious facts, like the UnaBomer case, may nevertheless warrant a non-death disposition.⁴⁷⁸

It should also be noted that the Supreme Court's death penalty jurisprudence prohibits certain prosecutorial arguments, such as an argument that misleads the capital jury to believe its verdict is not "final."⁴⁷⁹ The more general point is that appellate courts generally subject capital verdicts to particularly close scrutiny. With this fact in mind, federal capital prosecutors should be cautious in strategy and rhetoric. Any federal prosecutor about to try a capital

476. The Federal Judicial Center has reported that federal death penalty prosecutions cost an average of \$580,000 per case (prosecution and appointed defense costs), as opposed to an average of \$55,772 for death-eligible cases for which the death penalty is not sought. See 1998 JUDICIAL CONF. REPORT ON COSTS, *supra* note 246, at iii-iv; see generally RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 187-216 (1991). Unbiased cost studies are hard to find. For "high end" figures from abolitionist advocacy groups, see Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, reprinted in BEDAU 1997, *supra* note 14, at 405-06 (stating that "capital cases cost at least an extra \$2.16 million per execution, compared to . . . life in prison"); see also Death Penalty Focus of California, *The Cost of the Death Penalty in California* (visited Oct. 15, 1998) <<http://members.aol.com/Dpfocus/cost.htm>> (opining that slightly over \$2 million is spent for capital cases compared to roughly \$1.5 million for cases seeking life without parole). Meanwhile, the internet has yielded one web page contending that life without parole ("LWOP") costs twice as much as a death sentence case. See Wesley Lowe's *Pro Death Penalty Webpage* (visited Oct. 4, 1998) <<http://www.rit.edu/~wwl2461/cp.html>> (comparing 50 years of LWOP to six years on death row).

477. CAPITAL PUNISHMENT 1997, *supra* note 45, at 1 (the average time on death row for the 74 state prisoners executed in 1997 was 11 years and one month). The length of time between conviction and execution and the higher cost of capital cases are not unrelated. The time that federal prisoners linger on death row should be shorter, because they do not have a separate "state habeas" review process available.

478. See, e.g., Edwards, *supra* note 397 (discussing factors in accepting the Unabomer plea). As for the Oklahoma City case, which one hopes is *sui generis*, the costs of prosecution (which have not yet ended) have been announced as over \$80 million. *Oklahoma City Bomb Probe Cost \$80 million*, MARIN INDEP. J., Nov. 3, 1998, at A1.

479. *Caldwell v. Mississippi*, 472 U.S. 320, 347 (1985) (O'Connor, J., concurring to provide fifth vote); see *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (stating that argument must be misleading to be improper).

case should make a special review of ethical constraints on prosecutorial trial tactics and closing arguments.⁴⁸⁰

Similarly, federal prosecutors wishing to prosecute a death penalty case must also now consult with, and suffer intense review by, Main Justice at the highest levels. Having one's investigative and prosecutorial decisions personally reviewed by the Attorney General will be a new experience for most Assistant U.S. Attorneys. One hopes that federal prosecutors are circumspect and careful in every case they handle. But charging a federal capital case invokes a new level of scrutiny that must be anticipated by line federal prosecutors.

Finally, individual federal prosecutors must now add to their roles the moral implications of implementing the death penalty. Even if one supports capital punishment, prosecuting a death penalty case — operating as “an instrument of death” in the eyes of some — is surely a morally challenging responsibility.⁴⁸¹ Although federal prosecutors have for years had responsibility for prosecuting lengthy mandatory minimum imprisonment cases,⁴⁸² for many federal prosecutors a death penalty case will nevertheless “feel” different in its weight. Of course, the statute permits those with sincere “moral or religious convictions” against the death penalty to decline participation.⁴⁸³ Moreover, federal prosecutors whose moral misgivings regarding capital punishment would interfere with their effective prosecution of capital cases are ethically obligated to withdraw from that role.⁴⁸⁴ Federal prosecutors must therefore search their consciences to determine whether their participation will provide the United States with the committed attorney advocate to which it is entitled.⁴⁸⁵ Even when federal prosecutors can proceed in good conscience, they must gird themselves for a morally difficult, albeit necessary, institutional role.

480. See *Thompson v. California*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring to provide fifth vote) (“Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction.”).

481. See Noonan, *supra* note 39, at 1011.

482. See, e.g., *United States v. McKines*, 917 F.2d 1077, 1081 (8th Cir. 1990) (affirming mandatory life sentence without parole).

483. See 18 U.S.C. § 3597(b) (1994); George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 331-37 (1996) (discussing the “conscientious objector” provision of the FDPA). The equivalent CCE provision does not appear to encompass prosecutors, see 21 U.S.C. § 848 (r), but it makes no strategic sense for DOJ to compel a prosecutor with moral objections to remain on a capital case.

484. See MODEL RULES, *supra* note 377, Rule 1.7(b).

485. See *id.* Rules 1.2, 1.3, 1.7(b).

B. DOJ Administration of the Federal Death Penalty — A Good Start But There are Large Opportunities for Improvement

The foregoing account of how the DOJ's Capital Case Review Committee works⁴⁸⁶ no doubt reveals the author's overall positive evaluation of the DOJ's procedures for centralized review of proposed federal death penalty cases. The procedures that the Attorney General has put in place at Main Justice are thorough, open to defense input, and race-blind.

However, the Main Justice review procedures do little to regulate many discretionary federal death penalty decisions made by over 4,000 federal prosecutors "in the field." A serious flaw in the DOJ procedures is their lack of attention to significant prosecutorial decisions that are made *earlier* in the potential death penalty process by federal prosecutors in ninety-four separate U.S. Attorney offices. Whether to accept a case for federal prosecution, what and who to charge once the case is accepted, and whether to submit the case to Main Justice for review at all, are preliminary decisions that can be immensely influential when the death penalty is potentially in play. These field decisions are the ones that most dramatically affect the "pool" of death-eligible cases upon which Main Justice later imposes its review procedures. In addition, the later decision to accept or decline death-avoiding plea bargains is unregulated by Main Justice. Now that a centralized review process is in place in Washington, the DOJ should turn its attention to developing effective review strategies for influential death penalty decisions made in the field.

The remainder of this Article will discuss three problems that remain to be confronted by the DOJ in its administration of the federal death penalty: (1) regional disparity in a national system; (2) persistent racial disparities; and (3) semantic manipulability. These problems relate to the Department's internal protocols, the federal death penalty statute, and the nature of the criminal justice system as a whole.

1. Achieving National Uniformity in the Face of Regional Diversity

There is no doubt that capital punishment is disparately administered in the United States today. Regional diversity of views regarding the death penalty skews its imposition geographically.

486. See *supra* notes 383-410 and accompanying text.

First, twelve states — almost a quarter of the fifty — do not authorize capital punishment.⁴⁸⁷ No matter how egregious the conduct may be, murderers in these twelve States cannot receive the death penalty — at least not in their *state* criminal justice systems. All of these twelve “anti” death penalty states lie outside the historically-defined southern or border states.⁴⁸⁸

As for the thirty-eight states that do authorize capital punishment, there is a clear dichotomy between those that actively implement the death penalty and others that have carried out no, or very few, executions since *Gregg* reauthorized the death penalty in 1976. As of January 1999, of the thirty-eight states that authorize capital punishment, nine had carried out no executions since 1972,⁴⁸⁹ and in seven others there have been only one or two executions.⁴⁹⁰ Thus the death penalty is concentrated in only twenty-two states, less than half of the Union.⁴⁹¹ Finally, executions are clearly concentrated in the southern United States. As of October 1998, seven southern and border states account for almost three-fourths (73%) of all executions carried out in this country since *Furman*: Texas (167), Virginia (60), Florida (43), Missouri (33), Louisiana (25), and Georgia (23), and South Carolina (22).⁴⁹² The next closest states are Alabama (17) and Arkansas (17).⁴⁹³ Thus it is a fact

487. The 12 states that do not authorize capital punishment are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. In addition, the District of Columbia and Puerto Rico do not authorize capital punishment. See CAPITAL PUNISHMENT 1997, *supra* note 45, at 1.

488. The “southern states” are generally considered to be the 11 states that formed the Confederacy in the Civil War (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia). Similarly, “border states” describes the four states just above the southern states that also had slavery but remained in the Union during the Civil War (Delaware, Kentucky, Maryland and Missouri). See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 51, 101, 284 (1988).

489. The nine non-executing states are Connecticut, Kansas, New Hampshire, New Jersey, New Mexico, New York, Ohio, South Dakota and Tennessee. See Death Penalty Information Center, *Number of Executions By State Since 1976* (visited Jan. 30, 1999) <<http://www.essential.rog/dpic/dpicreg.html>> [hereinafter *Number of Executions By State Since 1976*].

490. See *id.* Only one execution has been performed in Colorado, Idaho, Kentucky, and Wyoming, and only two in Montana, Oregon, and Pennsylvania.

491. The 12 states with no capital punishment, plus nine with no executions and seven more with only one or two executions in at least 27 years, total 28 states with little or no capital punishment since *Furman* was decided.

492. See *Number of Executions By State Since 1976*, *supra* note 489. The total number of executions since *Furman* is 510; the seven leading states account for 373 of them. Texas alone is responsible for over 30% of all executions in that time.

493. *Id.*

that the southern and border states implement the bulk of capital punishment in this country.⁴⁹⁴

Such regional diversity is not necessarily surprising or improper. One genius of our federalist system is that States may enact widely varying policy decisions, so long as they do not run afoul of our national Constitution. The Equal Protection Clause forbids states to discriminate within their own borders; however, it does not prohibit lack of uniformity among States with regard to criminal punishment.⁴⁹⁵ With specific regard to the death penalty, *Gregg v. Georgia*⁴⁹⁶ and its companions made it clear that States may enact differing capital punishment structures so long as general constitutional principles of "guided discretion" are observed.

This calculus, however, changes when one considers Congress's and the Attorney General's stated goals for a national, *federal*, capital sentencing scheme.⁴⁹⁷ As noted above, the FDPA, the underlying congressional intent regarding federal sentencing, and the Attorney General's capital case protocols, all indicate a policy of at least rough uniformity in the administration of the federal death penalty.⁴⁹⁸ Yet, if uniform national administration of the federal death penalty is the object of the Department's authorization policies, it has been achieved only in a narrow, almost meaningless, sense. I have no doubt that once potential death penalty cases are submitted to Main Justice for review, the Attorney General and her Review Committee succeed as well as is humanly possible in achieving unbiased uniformity among the cases before them. Thus, for example, violent car-jacking death penalty cases are treated the same, and the death penalty is authorized or not, without regard to what district the case came from, and without knowledge of race or ethnicity. In this sense, uniformity in the handling of federal capital cases is achieved within the Department.⁴⁹⁹

494. Of course, like any generalization this one is of limited inferential value. For example, the southern state of Tennessee has executed no one since *Furman*, while the "northern" state of Illinois has executed 11 people. See *Number of Executions By State Since 1976*, *supra* note 489.

495. See U.S. CONST. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person *within its jurisdiction* the equal protection of the laws" (emphasis added). *Id.* Of course, to the extent that the theory of *Furman* is still valid, it places an outer constitutional limit on disuniformity in capital punishment.

496. 428 U.S. 153 (1976).

497. It might also change under a constitutional analysis of a federal system, but this Article does not undertake that separate examination. See *supra* note 449.

498. See *supra* notes 425-447 and accompanying text.

499. Because similar cases can always be distinguished at some level, perfect uniformity is impossible not only to achieve but even to evaluate. The reality of human

However, achieving procedural and substantive uniformity “within the Department” is only a partial triumph, and one that is severely limited if it produces complacency and serves to mask serious non-uniform results among potential federal capital cases across the country. This is because unless there is uniformity in federal charging and case-selection decisions, in *submissions* to Main Justice, and in post-authorization plea dispositions, then uniformity “within the Department” fails to address significant potential sources of disparity: disparate death penalty charging, submission, and plea-bargain decisions made in the field.

In fact, new data released by the DOJ suggests that the geographic disuniformity seen in state administration of the death penalty is reflected, though not nearly as extremely, in U.S. Attorney submissions of potential capital cases to Main Justice for review.⁵⁰⁰ Geographic disparity is also reflected to some extent in authorizations.

Specifically, since the Attorney General’s protocols were issued in 1995, sixty-three Districts have submitted 471 possible capital defendants for DOJ review; of the 374 actually reviewed,⁵⁰¹ 102 defendants were authorized for death penalty prosecutions.⁵⁰² Most immediately, it is apparent that thirty-one of the ninety-four federal districts, encompassing eleven complete states, have not submitted any potential capital cases in four years.⁵⁰³ It is difficult to believe that not a single murder in those eleven states since 1994 was a possible candidate for federal prosecution.⁵⁰⁴ Crimes result-

considerations may, in close cases, come into play. Thus, to continue the car-jacking example in the text, two cases in which victims were killed with similar aggravating and mitigating factors might still yield different results within the Department’s review system, if the U.S. Attorneys issued opposing recommendations and both argued strongly for their position. But if an explanation were called for, the difference in result would likely be formally justified by pointing to specific fact differences in the cases, rather than to the differing U.S. Attorneys’ recommendations, which in theory should not matter.

500. This data was transmitted to the author on January 25, 1999. It is reprinted in full in this Article. See *infra* note 558.

501. Cases submitted may not be finally reviewed for a variety of reasons. See *id.*

502. See *id.*

503. The 11 states in which U.S. Attorneys have submitted no cases for capital review from 1995-1998 are Delaware, Idaho, Maine, Mississippi, Montana, Nebraska, New Hampshire, Utah, Washington, Wisconsin, and Wyoming. Many states are divided into a number of separate federal districts, so that there are more non-submitting Districts than there are states. Thus, for example, while North Carolina has three federal districts, only two of those districts’ U.S. Attorneys have submitted cases for Main Justice review.

504. For example, despite having no data for three of the states, the FBI reports that in 1995 there were 713 adult arrests for murder or non-negligent homicide in the

ing in death are distributed approximately evenly throughout the United States.⁵⁰⁵ There are, sadly, gang-related killings in every urban center in America, and drug related killings occur not only in Miami, but also in urban centers such as New York, San Francisco, Chicago, and Seattle.

Furthermore, of the 471 total potential capital defendants submitted to DOJ for review, 177 (37% of the total) have come from the fifteen Southern or border states, while only thirty-nine have come from the twelve states that do not authorize the death penalty.⁵⁰⁶ When one looks at authorizations, the picture is slightly more stark. Fifty-one of the 102 defendants authorized for federal capital prosecutions have come from the fifteen Southern and border states, while only twenty-two have come from the twenty-one non-execution states.⁵⁰⁷ Finally, of the twenty federal defendants actually on death row, sixteen have come from prosecutions in Southern or border state Districts.⁵⁰⁸

Thus there does appear to be geographic disuniformity in administration of the federal death penalty, which to some extent reflects the regional maldistribution of State death penalty executions. To be sure, the federal situation is far less disparate than the States'.

11 states that made no capital review submissions to Main Justice. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 266-72 & n.6, Table 69 (1995). While jurisdictional reasons might prevent federally charging many of these murders, that such jurisdictional bars existed in all 713 cases seems highly unlikely.

505. That is, instances of non-negligent killing cases are not non-randomly distributed, such that they do not occur in anti-capital punishment states. For example, in 1995, there were 16,701 arrests around the country for "murder and non-negligent manslaughter." *Id.* at 209, Table 30. In the 12 states that do not authorize capital punishment there were still 2,453 arrests for such killings, or roughly 15% of the national total. *See id.* at 266-72, Table 69.

506. When submissions from the District of Columbia, Puerto Rico, and the Virgin Islands are excluded (because these jurisdictions have considerations operating that are uniquely separate from the States'), this regional contribution rises to 45% of the total.

507. The "non-execution" states are the 12 that do not authorize capital punishment at all plus the nine that, while technically authorizing capital punishment, have not executed anyone since 1972. *See supra* notes 476-477.

508. The 20 federal death row occupants were prosecuted in federal districts in Texas (four), Virginia (three), Louisiana (two), Missouri (two), Alabama, Arkansas, Colorado, Georgia, Kansas, Illinois, North Carolina, Oklahoma, and Pennsylvania. The Colorado and Pennsylvania cases addressed highly aggravated killings: the Oklahoma City bombing case, involving the death of 168 persons, was prosecuted in Colorado on a change of venue; and the Pennsylvania case involved a defendant who murdered another federal inmate while serving a 1,200-year Oklahoma state sentence. *See Federal Death Row Prisoners, supra* note 6. It should be noted, however, that the Department cannot control cultural or regional biases regarding capital punishment that can enter cases at the jury deliberation stage.

For example, U.S. Attorneys in seventeen of the twenty-one non-executing states have submitted cases for DOJ review, and two of the top five submitting states are New York and California.⁵⁰⁹ In addition, the distribution of submissions appears to be improving over time, perhaps as federal officials become more familiar with the federal death penalty statutes and DOJ procedures.⁵¹⁰ Nevertheless, the DOJ has reason to inquire whether the federal death penalty statutes are being applied even-handedly across the country.

Disuniformity has the potential to enter the federal death penalty system in at least three different prosecutive stages not controlled by Main Justice: the initial discretionary case-acceptance and charging stage, the discretionary decision to submit the case to DOJ for review, and the discretionary plea disposition stage.⁵¹¹ Lack of uniformity in submissions for Main Justice review is easiest to address, because it might be corrected simply by an amendment (and Main Justice enforcement) of the capital case protocols in the *United States Attorneys' Manual*. The other two sources of lack of uniformity (case-acceptance and plea bargaining) are more deeply embedded and are likely more difficult, if not impossible, to solve. Nevertheless, the Department could attempt to address these areas more self-consciously as well.

a. Lack of Uniformity in Submissions to Main Justice — Amend the Protocols

The Attorney General's capital case protocols require field prosecutors to submit for review at Main Justice all cases where a defendant is "charged with an offense subject to the death penalty."⁵¹² The quoted phrase is the "trigger" for submission to Main Justice. Obviously this language makes the exercise of prosecutorial charging discretion of paramount importance. But even putting the charging concern aside for the moment, the meaning of the trigger phrase "offense subject to the death penalty" is ambiguous. It leaves too much room for discretion to avoid Main Justice death penalty review. Although reasonable persons might

509. Combined federal districts in New York have submitted 78 defendants for review, and in California, 20 defendants. The other top submitting states are Virginia (57), Texas (29), and Maryland (24).

510. See *supra* note 412.

511. Of course, the DOJ can do nothing to control judge or jury discretion and biases, which can produce non-uniform death penalty results no matter what the Department does.

512. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.010.

agree that the review protocols were intended to bring into Main Justice all cases in which a federal death penalty *might* possibly be sought,⁵¹³ that is not precisely what the protocols say. Instead, two other, quite different, readings of the phrase "charged with an offense subject to the death penalty" are possible.

First, a "strong" reading of the trigger phrase might be that the Attorney General requires submission of all federal cases in which a *statute* that has been charged lists death as possible penalty. However, over forty federal statutes now provide death as a possible penalty, and all but a few prohibit the penalty unless "death results." For this reason, the strong reading of the "offense subject to the death penalty" as providing a *statutory* "trigger" for submission would produce a dramatically over-broad result. Most cases in which death-eligible statutes are charged do not actually involve *deaths*. Therefore, the simple "statutory trigger" reading would unnecessarily sweep into Main Justice hundreds of cases in which, while the statute charged might authorize a death penalty, the *facts* of the case plainly render a death sentence unavailable. For instance, the majority of cases charging car-jacking, narcotics distribution, or witness intimidation are not truly death-eligible, because the defendant has killed no one. If the goal is to achieve uniform treatment and the absence of bias in death penalty administration, there is no need for Main Justice to review thousands of non-killing federal cases charged under death-eligible statutes, because the death penalty is not available (with rare exception) unless a "death results."⁵¹⁴

Accordingly, "offense subject to the death penalty" ought not be defined solely by reference to the statute charged. This would result in submission of far too many cases in which the death penalty

513. In fact, in the 1997 reorganization of the UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, a caption to § 9-10.010 was added that describes the section as governing "federal prosecutions in which the death penalty *may* be sought" (emphasis added). But the text of that section does not repeat this language, and this caption was absent from Attorney General Reno's original promulgation of the protocols in 1995. Compare DEP'T OF JUSTICE MANUAL, *supra* note 12, § 9-10.000 ("purpose" section, now codified at UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.010). While the caption arguably helps to dispel the ambiguity of "offense subject to the death penalty," it does not eliminate it. Moreover, its anonymous pedigree renders it somewhat suspect.

514. 18 U.S.C. § 3591 (a)(2) (1998). The statutory exceptions to the "death results" rule are treason, espionage, and the new "super drug kingpin" death penalty provisions, and the constitutionality of imposing the death penalty for non-killing crimes has been left in some doubt after *Coker*, 433 U.S. 584 (1977). See *supra* notes 229-232.

is not actually available.⁵¹⁵ It would also represent an unprecedented expansion of DOJ review authority to non-capital criminal cases, which historically have been handled with autonomy by individual U.S. Attorneys' office.⁵¹⁶

But elimination of a "statutory trigger" for DOJ capital case submission also removes the easiest bright-line method of ensuring national uniformity in the pool of cases submitted. For how is a U.S. Attorney otherwise going to determine that a charged offense is "subject to the death penalty" so that submission is necessary? This is the point at which the protocols' ambiguity can yield less than uniform submissions.

A second reading of the protocols' "trigger" phrase, in the opposite direction, can be that *no* offense is "subject to the death penalty" unless its facts show all the necessary preconditions for the death penalty: a *mens rea* qualifier, sufficient aggravating factors, and insufficient mitigating factors. This reading would posit that a charged federal offense is not "subject to the death penalty" until a U.S. Attorney has determined that the death penalty is justified under the FDPA. Yet these judgments are the very ones that the protocols seek to bring to Main Justice for national, uniform interpretation and review. Unless each U.S. Attorney's resolution of these issues is to become, *de facto*, the final one, the ultimate death penalty criteria cannot serve as the initial trigger for Main Justice submission. Otherwise, U.S. Attorneys who have higher standards for seeking the death penalty than others will simply not submit for review many cases in which the death penalty plausibly might be sought.

The Attorney General's protocols plainly seem designed to prevent such a predetermining of the federal death penalty review process. Rather, the protocols recognize that U.S. Attorneys are

515. It would also resemble a system of automatic death penalty charging that the Supreme Court has described as "totally alien to our notions of criminal justice." *Gregg*, 428 U.S. at 199 n.50.

516. Prior to the advent of the federal sentencing guidelines in 1987 (*see* 18 U.S.C. § 3551), individual districts had authority to seek differing sentences even for like offenses and offenders. The resulting disparity in federal sentencing was a chief stimulus for the new federal sentencing guidelines legislation. *See generally* Breyer, *supra* note 433. But even the new sentencing guidelines seek to regularize federal sentencing largely through judicial oversight, not through Main Justice review. *See Koon*, 518 U.S. 81. Although prudence may sometimes counsel getting Main Justice advice, U.S. Attorneys are not required to submit guidelines sentencing issues for DOJ review before taking positions on them in district courts around the country. The death penalty protocols thus already represent an unprecedented attempt to achieve national sentencing uniformity, in a discrete area, through pretrial (even pre-indictment) Main Justice review.

subject to human differences regarding capital punishment. They will evaluate similar capital punishment cases differently, both consciously and unconsciously.⁵¹⁷ The review protocols are intended to even out such inevitable differences, by bringing *all* possible death penalty cases to one place and permitting a centralized, relatively small group of experienced prosecutors to compare all death-eligible cases, from all ninety-four different districts across the nation, and arrive at roughly consistent dispositions.

The Department thus does not want U.S. Attorneys in the field to use, as their "trigger" for submission, their own ultimate determination of whether the charged offense *should* subject the defendant to the death penalty. Such a high standard would pretermitt determinations for which national uniformity is a stated goal. It would effectively substitute the initial determination not to submit the case for review for the Attorney General's ultimate decision on the matter, for all such cases originating in a particular district.⁵¹⁸

Instead, if national "consistency" is the goal, the Department should review all cases in which a death penalty might *possibly* be sought, particularly those in which some U.S. Attorneys might not wish to actually seek the death penalty, in order to make nationwide comparisons between cases similar on their facts. Only by such a broad review can the Department develop and apply *national* standards for application of the FDPA and ensure, so far as humanly possible, regularity and the absence of inappropriate bias in all federal death penalty charging decisions. The conception underlying the protocols is that a case should receive the death penalty, or not, irrespective of its geographic location. Similar cases should be treated similarly, whether in liberal, anti-death penalty San Francisco or more conservative, pro-death penalty districts.⁵¹⁹ This concept of rough national uniformity underlies the FDPA and

517. Cf. *United States v. Sanchez-Rodriguez*, 161 F.3d 556, 565 (9th Cir. 1998) (*en banc*) (Trott, J., dissenting) (noting the "different perspectives of those judges making [sentencing] decisions"). "Judges in New York City may believe that a \$20 sale of heroin is small potatoes, but in Pocatello [Idaho], those potatoes may be considerably more significant." *Id.*

518. Note that if the system were to function in this manner, then the Attorney General would largely become simply one more "screen" against the death penalty. That is, potential death penalty cases would fall out all along the system, with only the most egregious even making it to Main Justice for review. Opponents of capital punishment might well be satisfied with such a "one-way" system, but it would not reflect the "consistent" administration of the FDPA that the DOJ says it wants.

519. Districts in states that have relatively frequent executions might be compared. For example, Texas alone has carried out over 32% (166 of 510) of the executions in the United States since 1977. See CAPITAL PUNISHMENT 1997, *supra* note 45, at 3.

federal criminal sentencing in general, and is central to the Attorney General's vision of the capital case review system.⁵²⁰

Thus, under its protocols, what the Attorney General presumably desires is for all U.S. Attorneys to submit for Main Justice review all cases in which a defendant is charged with an offense which, on its facts, is possibly subject to the death penalty. One simple way to ensure that all such cases are "captured" by the DOJ review system would be to require submission of all federal cases *in which a killing has occurred*. (Special provisions could be written to capture the rare treason, espionage, or "super drug kingpin" cases that do not involve killings, and such cases likely are too rare and significant to escape Main Justice attention in any case.) Moreover, to ensure that results are not skewed by case declination decisions made by U.S. Attorneys in the field, cases in which a killing occurs that are referred to a U.S. Attorney, *but declined*, should also be submitted for at least a cursory Main Justice review.⁵²¹

While the preferred reading of the current submission trigger may be clear to most, its literal language needlessly permits ambiguous interpretation. Such ambiguity has the potential to distort the "pool" of cases that the Department reviews. U.S. Attorneys who are less eager than others to seek capital punishment might rely on the trigger ambiguity to not submit cases which are, in fact, quite similar to cases being submitted by other U.S. Attorneys more eager to seek the death penalty. One result is likely to be geographic disuniformity in cases submitted for review, between districts with pro-capital punishment U.S. Attorneys. This, in turn, could lead to reflective disuniformity in the cases actually authorized for federal death penalty prosecution.

The potential problem, however, is more serious than simply geographic disuniformity. Uneven review submission standards can

520. See *supra* notes 434-446 (citing 28 U.S.C. § 991(b)(1)(B) (1994) (attempting to "avoid unwarranted sentencing disparities") and UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080 (striving for "consistency and fairness"). As explained above, this Article takes Congress and the Attorney General at their word and premises its proposals on an underlying goal of national uniformity in death penalty administration. There are reasonable arguments to the contrary. For example, in an area as controversial as capital punishment, U.S. Attorneys with largely anti-death penalty jury pools might reasonably contend that this cultural bias will adversely affect a death penalty prosecution such that the penalty should be foregone in order to ensure conviction. However, while this argument is not unreasonable, at bottom it is in deep tension with a goal of national uniformity.

521. See *supra* notes 472-520 and accompanying text (discussing declination decisions and review in greater detail). Of course, this would still not capture cases that are never referred to a U.S. Attorney's office but which still might be changed federally. There are necessary limits, however, to intrusive DOJ review policies.

also lead to *substantive* disuniformity – that is, a lack of equal death penalty charging *results* in factually similar cases.⁵²² Because the trigger phrase provides U.S. Attorneys with broad submission discretion, it is likely that potential capital cases are not being submitted for review from districts where the federal prosecutors are uneasy about pursuing capital punishment. If most cases submitted to Main Justice for review come from districts in which U.S. Attorneys are eager to pursue a death penalty, the resulting “pool” of cases examined at Main Justice is *substantively* skewed toward less aggravated cases — cases in which other U.S. Attorneys, if forced to take a position, would oppose seeking a death penalty. However, the latter group of less eager U.S. Attorneys is currently able to be silent in the DOJ capital punishment debate, because they can simply not submit such less-aggravated cases for review.

Meanwhile, the Capital Case Review Committee at Main Justice is effectively developing national death penalty statutory interpretations and application standards, but based on a pool of cases which is substantively skewed toward more aggressive capital prosecutions and with more aggressive U.S. Attorneys as the vocal advocates. Missing from the pool, and thus from the advocacy of debate and the Review Committee’s interpretive analysis, are similar cases arising in Districts that do not submit them for review because they do not seem, to those U.S. Attorneys, to be “subject to the death penalty.” In other words, if the pool of death penalty case submissions is substantively skewed, it distorts the Death Penalty Review Committee’s interpretive process, because the Committee does not have available as a basis for national comparison similar potential death penalty cases that would *not* be recommended for the penalty (if submitted for review) by other Districts. A skewed pool of submissions — skewed substantively as well as geographically — seems inconsistent with the Attorney General’s stated goals of “consistency and fairness.”⁵²³

The ambiguity in the submission trigger is needless, and should be eliminated. The protocols should be amended to ensure that *all* potential federal death penalty cases are captured for Main Justice review.⁵²⁴ The new language should encompass not just all charged

522. See *supra* notes 428-431 (discussing substantive uniformity concept).

523. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, § 9-10.080

524. The content of the protocols is not a trivial matter. Rather, it can deeply influence federal prosecutor behavior. Although the provisions of the *United States Attorneys’ Manual* are not well-publicized, Professor (and former federal prosecutor) Steven Clymer has similarly suggested that they are sufficiently influential on the be-

cases where a death has resulted, but also all potential capital cases that *might* have been charged federally but, instead, were declined by a U.S. Attorney's office. Such a broader and clearer submission trigger need not be complex; rather the protocols could be amended simply to require submission to Main Justice for "all cases, charged *or declined*, in which a *killing has occurred*."⁵²⁵ This would make crystal clear their purpose and could truly nationalize the Department's death penalty review system.⁵²⁶ Otherwise, a lack of geographic and substantive uniformity is the likely result. The group of cases actually presented for review is likely skewed toward cases in which U.S. Attorneys, as a *national* group, would not agree that a death penalty is justified, and truly representative national evaluation standards cannot be developed.

Only by ensuring that the pool of cases submitted for review is truly a national one, and that arguments presented by U.S. Attorneys for or against death penalty authorizations are truly representative of the *national* body of U.S. Attorneys, can the Attorney General's Review Committee develop truly representative national standards for uniform administration of the federal death penalty. Otherwise the pool of cases is skewed toward less-aggravated capital cases, and the debate at Main Justice is driven largely by those U.S. Attorneys who are eager to prosecute seeking the death penalty. Enforcing a truly national, and all-encompassing, review submission policy would compel U.S. Attorneys who are presently silent in the death penalty debate to participate.⁵²⁷

If one hypothesizes that the standards of these currently non-participating U.S. Attorneys for seeking the death penalty are "higher" or more rigorous than some others, then the addition of

havior of federal prosecutors to warrant amendment (in his Article, to help guide case selection and charging decisions in general). See Clymer, *supra* note 359, at 708-17.

525. Of course, what constitutes a "declination" would also have to be defined and regulated, so that "informal" referrals and declinations do not become a surrogate for the present disuniformity. One definition might be simply any case discussed between any federal prosecutor and a law enforcement official for possible federal charging. Regulating declination decisions is not an entirely new concept; the UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, already requires prosecutors to put their "reasons" for declinations in their "office files." *Id.* § 9-27.270.

526. Thus various sections in the capital case protocols, e.g. *id.* §§ 9-10.010, 10.020, 10.030, would need amendment of their "offense subject to the death penalty" language.

527. Of course, it currently is not politically popular to express misgivings about capital punishment, generally or in particular cases. To foster full and candid U.S. Attorney participation, the DOJ debate regarding substantive federal death penalty prosecution standards should be entirely internal and confidential, until the Department is prepared to publish its views as an institution.

their voices to the debate might well *raise* the federal standards for pursuing the death penalty.⁵²⁸ Thus the result of compelling broader case submissions for Main Justice review would *not* necessarily be an increase in the number of federal capital prosecutions. Instead, the result could be a raising of federal capital charging standards, to appropriately reflect the range of views within the entire DOJ, such that less aggravated cases that are currently being authorized for the death penalty might not be.⁵²⁹ While the net result — more or less federal death penalty prosecutions — is impossible to predict, the gain in national consistency, as well as in open and broad-ranging debate within the Department, seems worth the attempt.

b. Disuniformity in Charging and Plea-Bargaining — an Intractable Problem?

Even putting aside, for the moment, the disturbing specter of persistent racial disparities in capital prosecutions and sentencing,⁵³⁰ lack of uniformity caused by good-faith but uneven exercise of prosecutorial discretion is likely to persist in the administration of the federal death penalty. An amendment to the Attorney General's submission criteria cannot, by itself, make federal death penalty prosecutions uniform, because discretion over other aspects of potential capital cases — case selection, charging, and plea dispositions — still resides almost entirely with individual federal prosecutors in the field. Such decisions are largely unregulated and unreviewed with any specificity at Main Justice, even in capital prosecutions. So long as unreviewed discretion can significantly influence the selection and disposition of federal capital cases, internal guidelines to assure that every possible death-eligible federal case is submitted to Main Justice for review might improve, but not entirely eliminate, disparity concerns.

As Professor Randall Kennedy has noted, “the institutional actors who have the most to do with the prevalence and incidence of

528. U.S. Attorneys do not participate in Main Justice debates only, or even primarily, through individual capital case reviews. Rather, the primary mechanism for U.S. Attorney input is via the Attorney General's Advisory Committee (“AGAC”) of U.S. Attorneys. The AGAC is, in effect, a lobbying group of U.S. Attorneys within Main Justice. If the capital case submission trigger for U.S. Attorneys is broadened, the AGAC is sure to focus on the issue.

529. See *infra* note 574 and accompanying text (addressing the “level up” concern).

530. See *infra* notes 590-598.

capital sentences are prosecutors.”⁵³¹ This is obviously true in light of the basic fact that many criminal homicides are not charged as death-eligible crimes, and most death-eligible crimes do not go to verdict before a jury. Parsing notoriously vague national statistical sources, Professor Hugo Bedau has estimated that only 13-25% of people arrested for criminal homicide are even at risk for a death sentence, and that over half of all persons convicted for criminal homicide offenses plead guilty.⁵³² It appears that less than 1% of all persons arrested, and only about 2% of those convicted, on criminal homicide charges actually receive a death penalty.⁵³³ Federally, we know that of 418 cases reviewed by the DOJ since 1990 for potential death penalty filing, only 135 or about one-third were authorized for such filing — clearly reflecting the exercise of some prosecutorial discretion.⁵³⁴ Moreover, of the 135 federal death penalty cases authorized between 1990 and January 1999, at least forty-three (32%) were resolved by guilty pleas that avoided the

531. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 343 (1997) [hereinafter KENNEDY, *RACE, CRIME, AND THE LAW*]. See also BEDAU 1997, *supra* note 14, at 32 (stating that “the prosecutor’s decision” is responsible for a large portion of the “enormous attrition” between criminal homicide arrests and death sentences actually imposed); Bright, *supra* note 451, at 450 (“The most important decisions that may determine whether the accused is sentenced to die are those made by the prosecutor.”); Jordan, *supra* note 10, at 1111 (opining that “plea bargaining in capital cases is a powerful factor in deciding who is ultimately put to death”).

532. Professor Bedau estimates that of an average 15,000 annual arrests for “criminal homicide” — what the FBI labels “murder and non-negligent manslaughter” — from 1984-1993, only 36% of the 10,000 persons annually convicted (and only about 20% of those arrested) were convicted by jury trial, and only between 2,000-4,000 are “at risk for a death sentence in capital jurisdictions.” BEDAU 1997, *supra* note 14, at 31-2.

533. BEDAU 1997 *supra* note 14, at 31-2. Professor Bedau notes that 250 “actual death sentences” is the annual average for the period 1984-93, less than two-tenths of 1% of the roughly 15,000 persons annually arrested for criminal homicide offenses. *Id.*: Similarly, U.S. DOJ data for 1992 indicates that 22,100 persons were arrested nationally for “murder and non-negligent homicide,” 13,926 persons were prosecuted for those offenses and 12,672 (90%) were convicted. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 418, Table 4.1 (1993) (displaying the “estimated number of arrests, 1992”); BUREAU OF JUSTICE STATISTICS, 1995, Tables 5.18 & 5.63 (displaying the number of defendants prosecuted in federal and state courts) and Tables 5.44 & 5.45 (displaying the number of defendants convicted in state and federal courts). Of the 12,672 persons convicted of homicide offenses in 1992, 265 or just over 2% received the death penalty. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *CAPITAL PUNISHMENT* 1992 1 (1993). It is also notable that only 288 of these 12,672 criminal homicide prosecutions occurred in federal courts, and that a far lesser percentage — 124 federal defendants, or less than 50% — were convicted. See BUREAU OF JUSTICE STATISTICS 1995, *supra*, at Tables 5.18 & 5.45.

534. See *supra* chart at p. 429.

death penalty.⁵³⁵ Clearly it is the exercise of prosecutorial discretion that has the largest single impact on capital punishment in this country.

The DOJ's internal regulations, including the capital case protocols, currently permit virtually all prosecutorial discretion over federal death penalty charging and plea-bargaining to be exercised in the field, without prior Main Justice approval. There is no general requirement that a U.S. Attorney obtain approval before "seeking an indictment for an offense subject to the death penalty," although Main Justice consultation "is encouraged."⁵³⁶ Similarly, a "United States Attorney may approve any plea agreement" in a federal death penalty case even after the Attorney General has authorized the death penalty, without "prior authority" from the Attorney General (however, an explanation must be provided later to Main Justice).⁵³⁷ Such unapproved plea dispositions in capital cases always avoid the death penalty. This independence at the plea stage exists despite the anomalous fact that the Attorney General's approval for filing the death penalty notice in the first place is required.⁵³⁸

Finally, prosecutorial discretion exists in the federal system in a way not precisely identical to state prosecutors' discretion: the discretion to decline accepting a case in favor of state prosecution. Because many crimes are "dual jurisdiction," that is, chargeable under some provision of state as well as federal criminal law, federal prosecutors frequently have the option of allowing a death-eligible murder case to "go stateside," meaning, forego a federal prosecution in deference to state or local authorities who can prosecute the case as murder.⁵³⁹ In fact, the DOJ's death penalty protocols seem to suggest a preference for state prosecution in

535. See *supra* chart at p. 431. This percentage likely will increase, as 33 authorized federal capital prosecutions were still awaiting disposition as of the date of that chart. See *id.*

536. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.020. Some pre-indictment approval requirements do exist in other parts of the Manual, but they are offense-specific and not restricted to capital prosecutions. See *id.* (18 U.S.C. § 1959 (indictments)); see also DEP'T OF JUSTICE MANUAL, *supra* note 12, § 9-2.400 (listing in chart form the general "prior approval" requirements, not specific to capital cases).

537. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.100

538. See *id.* at § 9-10.020 (stating that "[t]he death penalty shall not be sought without the prior written authorization of the Attorney General"); see *supra* notes 374-382.

539. See Little, *Myths and Principles of Federalization*, *supra* note 68, at 1034-35 (discussing exclusive and "dual" jurisdiction offenses). Exceptions would include murders committed on federal enclaves, or on the high seas, or in a foreign country. See *id.*

potential federal capital cases: "Where concurrent jurisdiction exists with a State or local government, it is anticipated that a Federal indictment for an offense subject to the death penalty will be obtained *only* when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities."⁵⁴⁰ The *United States Attorneys' Manual* is explicit regarding the fact that the exercise of prosecutorial discretion not to charge will normally go unreviewed: "[i]t is left to the judgment of the attorney for the government" ⁵⁴¹

There are good and strong reasons to allow prosecutors broad discretion in their case selection and charging decisions.⁵⁴² Nevertheless, the ability to avoid accepting a potential death penalty case based upon an unreviewed evaluation that the "interests" of state officials in prosecuting are "more substantial" provides federal prosecutors with a significant discretionary tool for avoiding capital cases. So far as I know however, there is currently no Main Justice review of decisions made by federal prosecutors not to charge at all in a murder case.⁵⁴³

There is some general guidance in the *United States Attorneys' Manual* about when federal prosecutors should, and should not, exercise their federal charging power. First, the death penalty protocols provide some discussion of three factors ("not . . . an exhaustive list") relevant to determining which jurisdiction's interest in

540. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070 (emphasis added). This provision assumes that there is probable cause, as well as jurisdiction, to bring the case in federal court. It builds upon the prosecutorial ethical proposition that "[m]erely because [probable cause] can be met . . . [it] does not automatically warrant prosecution." *Id.* § 9-27.210(8); *see also* ABA Standards for Criminal Justice — Prosecution Function, § 3-3.9(b) ("The prosecutor is not obliged to present all charges which the evidence might support.").

541. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-27.220B.

542. *See, e.g.,* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'"); Wayte v. United States, 470 U.S. 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

543. Again, while a lack of federal jurisdiction may explain many U.S. Attorney declination decisions, it does not explain them all. *The Department of Justice Manual* does direct that when a federal prosecutor declines to prosecute, "the reasons therefore" should be "reflected in the office files," DEP'T OF JUSTICE MANUAL, *supra* note 12, § 9-27.270A. However, in the author's experience, this direction is rarely observed. In any case, I am aware of no systematic process in the DOJ to gather and systematically review such individual declination records, if they do in fact exist.

prosecution, state or federal, is "more substantial." These factors, however (and perhaps necessarily), are vague and manipulable in the prosecutor's discretion.⁵⁴⁴ A somewhat more detailed discussion of "substantial federal interest" appears in the general "Principles of Federal Prosecution" section of the *United States Attorneys' Manual*, which is applicable generally to the decision to indict in any federal case.⁵⁴⁵ This section discusses seven non-exhaustive factors to consider, while three following sections discuss two other possible reasons to decline to file federal charges and three flatly "impermissible considerations."⁵⁴⁶ Finally, the death penalty protocols make it clear that the fact that the death sentence might be available if the case were charged federally, where the conduct occurs in a state that does not authorize capital punishment, is not "alone" sufficient to establish a "more substantial" federal interest.⁵⁴⁷

The DOJ deserves commendation for being willing to commit its views regarding the exercise of prosecutorial charging discretion to writing.⁵⁴⁸ The *United States Attorneys' Manual* provisions are thoughtful and provide helpful guidance to new and experienced federal prosecutors alike.⁵⁴⁹ Moreover, and perhaps contrary to

544. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070 (subtitled "Substantial Federal Interest"), Section A (subtitled "The relative strength of the state's interest in prosecution"), Section B (subtitled "The extent to which the criminal activity reached beyond the local jurisdiction") and Section C (subtitled "The relative ability and willingness of the State to prosecute effectively"). Only Section B seems to provide relatively concrete and objective factors to consider.

545. DEP'T OF JUSTICE MANUAL, *supra* note 12, § 9-27.230.

546. *Id.* § 9-27.240 ("Prosecution in Another Jurisdiction"); *id.* § 9-27.250 ("Non-Criminal Alternatives to Prosecution," which is plainly not relevant to most criminal homicidal conduct); *id.* § 9-27.260 ("Impermissible Considerations": "(1) The person's race, religion, sex, national origin, or political association, activities, or beliefs; (2) The attorney's own personal feelings concerning the person, the person's associates, or the victim; or (3) The possible effect of the decision on the attorney's own professional or personal circumstances"). *Id.*

547. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 10.070.

548. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 225 (1969) (recommending that prosecutors "make and . . . announce rules, that will guide their choices, stating as far as practicable what will and what will not be prosecuted, and they should be required otherwise to structure their discretion."); see also Zacharias, *supra* note 475.

549. New prosecutors are hungry for guidance on the exercise of their new-found powers, which is not taught in most law schools or civil practice settings, and perhaps cannot be taught other than in the crucible of real prosecutorial decision-making. Experienced federal prosecutors can also benefit from reading (or re-reading) the *U.S. Attorneys' Manual*, lest they become "lazy" or forgetful about the *Manual's* well-considered and surprisingly candid discussions. Indeed, I have often thought that a "*United States Attorneys' Manual* Refresher Course" ought to be mandatory for all federal prosecutors after three to five years of federal prosecutorial experience.

the belief of some Department critics, most federal prosecutors do read and try to implement in good faith the Manual's provisions.⁵⁵⁰ Criticisms offered here are intended not as condemnation but in a constructive spirit.

i. Why Disuniformity and Skewed Samples Result in Federal Death Penalty Administration

It must be recognized that the unreviewed ability of "field" federal prosecutors not to charge a homicide case federally unless the State's interest in prosecuting can be said to be "less substantial," results not only in unreviewed lack of uniformity but also in a skewed sample of potential capital cases that Main Justice reviews. One need not assert prosecutorial "bad faith" to demonstrate this. In a federal charging system that encompasses the entire country, the decentralized good-faith exercise of discretion regarding capital cases almost certainly yields skewed, non-uniform results.

The reason for this is simple: the federal prosecutorial system is historically and self-consciously decentralized, and prosecutorial attitudes around the country about capital cases vary as much as, and to some extent in conjunction with, public attitudes regarding the death penalty generally. As noted above, our nation's states can be roughly divided into three groups regarding the death penalty: (1) those that support the death penalty and implement it vigorously; (2) those which authorize capital punishment but are queasy regarding its implementation; and (3) those which do not

550. I have no empirical studies or systemic evidence to back up this assertion. However, as a federal prosecutor for some eight years, I personally observed many office discussions about how to exercise prosecutorial discretion that invoked, and often centered on, provisions of the Manual. In addition, since October 1994, within the DOJ, there has been a internal nationwide ethics training effort called the Professional Responsibility Officers ("PRO") program, initiated by Attorney General Janet Reno and Assistant Attorney General (Criminal Division) Jo Ann Harris, which has produced an Ethics Manual containing discussion on dozens of difficult prosecutorial discretion issues. The PRO Ethics Manual has been distributed to every Main Justice Section and U.S. Attorney's office in the country (on file with the author). The PRO program also provides a two-day intensive training session in Washington D.C. for one or two attorneys from every office in the country on a semi-annual basis. The PRO Ethics Manual and training program (in which I have been an instructor) is full of references to the *United States Attorneys' Manual*. It is ill-informed and cynical to assert that most federal prosecutors do not read the *United States Attorneys' Manual*. Although, while it may be true that they do not read it often enough, this criticism can be made of most lawyers and their governing codes of ethics. As a legal ethics instructor to many non-governmental Bar groups, I can report that most practicing lawyers admit that they have not read their jurisdiction's ethical rules within the last year.

authorize capital punishment.⁵⁵¹ While one might argue about which particular states that authorize the death penalty fall into category one or two, a rough division of states — and of public attitudes generally — into those “pro,” “undecided,” and “con” on the death penalty seems clear.

Noting this diversity of public views, it may then reasonably be hypothesized that lawyers selected by a state’s Senators or Congresspersons to be a U.S. Attorney⁵⁵² will, by and large, reflect the prevailing views of their state on capital punishment. This, of course, will not be true in every case, and the political party affiliation of the appointing President may produce “swings” in U.S. Attorneys’ views.⁵⁵³ But, to hypothesize at the extremes of our national capital punishment spectrum, one might expect U.S. Attorneys in Texas, where capital punishment is most often implemented, to more eagerly favor prosecution of capital cases than would the U.S. Attorneys in some New England states.

If this hypothesis is true, then it is also likely true that the good faith prosecutorial evaluation of what constitutes a proper and deserving federal death penalty case will vary between “pro” and “con” districts. Of course, Congress has directed that the federal death penalty be applied nationally, and the Attorney General has required that all federal offenses “subject to the death penalty” be submitted to Main Justice for a national “consistency” review. Nevertheless, the federal death penalty statute requires a prosecutorial belief that the federal death penalty is “justified,”⁵⁵⁴ and the DOJ protocols require a prosecutorial assertion that the federal interest in prosecuting is “more substantial” than the

551. See *supra* note 491 (noting that 12 states do not authorize capital punishment and another 16 seldom execute anyone). The other 22 states have carried out over 98% of the 510 executions since *Furman*.

552. It is true that U.S. Attorneys are nominated by the President and confirmed by the Senate. However, with rare exception, candidates for the office are normally first recommended by a U.S. Senator of their home State if the Senator is of the same party as the President, or by the local congressional delegation of the President’s party if no such Senator is in office. See EISENSTEIN, *supra* note 375, at 36; Rickhoff, *supra* note 452, at 513-14.

553. That is, in a state that favors the death penalty, a Democratic President might be inclined to appoint an U.S. Attorney less in favor of the death penalty than the general public, and the reverse might be true for a Republican President making appointments in an anti-death penalty state. Moreover, the entire issue must be kept in perspective: a U.S. Attorney candidate’s views on capital punishment will generally not be the only, or even a primary, concern of the appointing parties.

554. 18 U.S.C. § 3593(a)(1) (1994).

state's.⁵⁵⁵ If the cultural and community milieu and the prior legal experiences of a U.S. Attorney and his or her assistants consists of general support for capital punishment, these "trigger" assertions may be more easily and frequently made, naturally and in good faith. Conversely, when the local cultural milieu opposes capital punishment and has undergone no (or little) local implementation of the death penalty in a U.S. Attorney's professional lifetime, then decisions not to charge potential death cases federally, or to prosecute them without death penalty exposure, may more easily and frequently be made, in complete good faith.⁵⁵⁶

Current federal experience with administering a nationally applicable death penalty supports this hypothesis. The thirteen states that most vigorously implement capital punishment⁵⁵⁷ have submitted 154 potential capital cases to DOJ for review since 1995; the twelve States that do not authorize capital punishment have submitted only thirty-nine review cases.⁵⁵⁸ Moreover, in forty-three of

555. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.070. Some have argued, in the capital context, that the assertion should be that the federal interest in seeking the *death penalty* be "more substantial" than the state's. This is an intriguing idea that could have significant impact on federal death penalty filings. However, it is beyond the scope of this Article.

556. The hypothesized correlation between the State position on capital punishment and a U.S. Attorney's capital case decisions is by no means exact. For example, it is entirely possible that a pro-death penalty U.S. Attorney in a pro-death penalty State might still decline potential death penalty cases for resource reasons, comfortable that his or her state counterparts will seek death. My thanks to Professor Steven Clymer for noting this point.

557. These are the 13 states that have executed 11 or more defendants since *Furman*. See *Executions of Federal Prisoners 1927-1998*, *supra* note 111.

558. It must be noted, however, that 39 submissions from U.S. Attorneys in states that do not even authorize capital punishment could be viewed as a remarkably high and independent number. Of course, the data does not reveal what the U.S. Attorneys recommended – death or no death – in the cases submitted.

DISPOSITION OF CASES SUBMITTED FOR DOJ CAPITAL REVIEW, BY DISTRICT

District					As of December 31, 1998		
	1995	1996	1997	1998	Total Number Submitted	Number Reviewed	Number Authorized
N.D. Alabama	0	0	2	0	2	2	2
D. Alaska	0	1	0	0	1	1	1
D. Arizona	0	1	1	2	4	2	0
E.D. Arkansas	0	0	2	1	3	3	2
W.D. Arkansas	0	2	1	0	3	3	3
C.D. California	2	0	3	4	9	7	3
E.D. California	0	1	3	3	7	4	2
N.D. California	0	0	1	3	4	1	0

	1995	1996	1997	1998	Submitted	Reviewed	Authorized
<i>D. Colorado</i>	1	1	1	2	5	4	2
<i>D. Connecticut</i>	0	0	1	6	7	7	0
<i>District of Columbia</i>	9	3	3	2	17	6	1
<i>N.D. Florida</i>	3	0	0	2	5	5	2
<i>S.D. Florida</i>	0	0	0	3	3	0	0
<i>N.D. Georgia</i>	0	4	0	0	4	1	1
<i>S.D. Georgia</i>	0	0	0	2	2	0	0
<i>D. Hawaii</i>	0	0	0	4	4	3	0
<i>N.D. Illinois</i>	0	2	5	0	7	7	2
<i>S.D. Illinois</i>	0	0	0	1	1	1	1
<i>N.D. Indiana</i>	0	0	0	1	1	0	0
<i>S.D. Indiana</i>	0	0	0	1	1	1	0
<i>N.D. Iowa</i>	0	0	0	4	4	3	0
<i>S.D. Iowa</i>	0	0	2	0	2	2	2
<i>D. Kansas</i>	2	1	5	2	10	10	4
<i>E.D. Kentucky</i>	0	1	0	0	1	1	0
<i>W.D. Kentucky</i>	0	3	0	1	4	3	0
<i>E.D. Louisiana</i>	3	0	0	4	7	4	3
<i>D. Maryland</i>	0	7	15	2	24	20	2
<i>D. Massachusetts</i>	1	0	3	0	4	4	0
<i>E.D. Michigan</i>	1	0	6	6	13	13	2
<i>W.D. Michigan</i>	1	0	2	0	3	3	0
<i>D. Minnesota</i>	2	0	0	0	2	2	0
<i>E.D. Missouri</i>	0	2	2	1	5	3	3
<i>W.D. Missouri</i>	2	0	0	2	4	4	4
<i>D. New Jersey</i>	0	0	2	0	2	2	1
<i>D. New Mexico</i>	2	8	0	0	10	10	5
<i>E.D. New York</i>	2	6	8	26	42	29	3
<i>N.D. New York</i>	3	3	0	0	6	6	2
<i>S.D. New York</i>	1	4	11	14	30	27	4
<i>D. Nevada</i>	0	0	0	6	6	6	0
<i>E.D. North Carolina</i>	0	7	0	2	9	8	4
<i>W.D. North Carolina</i>	0	2	0	1	3	2	2
<i>D. North Dakota</i>	0	0	0	1	1	0	0
<i>N.D. Ohio</i>	0	1	0	3	4	3	0
<i>W.D. Oklahoma</i>	2	0	0	0	2	2	2
<i>D. Oregon</i>	0	0	1	0	1	1	0
<i>E.D. Pennsylvania</i>	0	1	2	0	3	3	0
<i>M.D. Pennsylvania</i>	0	3	1	0	4	4	3
<i>W.D. Pennsylvania</i>	0	0	1	0	1	0	0
<i>D. Puerto Rico</i>	7	7	29	16	59	50	10
<i>D. Rhode Island</i>	0	4	0	0	4	4	0
<i>D. South Carolina</i>	0	1	3	1	5	3	0
<i>D. South Dakota</i>	0	0	0	3	3	3	0
<i>M.D. Tennessee</i>	1	0	5	0	6	4	2
<i>W.D. Tennessee</i>	0	0	0	1	1	1	1
<i>E.D. Texas</i>	0	0	1	1	2	2	1
<i>N.D. Texas</i>	6	4	0	0	10	10	3
<i>S.D. Texas</i>	0	0	0	5	5	4	0
<i>W.D. Texas</i>	0	0	0	12	12	1	1
<i>D. Virgin Islands</i>	0	0	0	1	1	1	0
<i>D. Vermont</i>	0	0	0	1	1	1	1
<i>E.D. Virginia</i>	2	8	30	12	52	47	14
<i>W.D. Virginia</i>	1	4	0	0	5	5	1
<i>N.D. West Virginia</i>	0	3	2	3	8	5	0
Total	54	95	154	18	471	374	102

Chart provided by DOJ (on file with the author).

the 154 cases submitted from the executing states, the death penalty was authorized (27%). But only four, or 10%, of the submissions from no-death-penalty states were authorized. This is significant because the force with which a U.S. Attorney argues for, or against, authorization of the death penalty can have a large effect on the Review Committee.⁵⁵⁹ If U.S. Attorneys who are uneasy about capital punishment submit cases for review but then argue forcefully against authorization, they can produce results in mid-range cases⁵⁶⁰ that are disparate from similar cases that are forcefully advocated by other, more pro-capital punishment U.S. Attorneys.

Even if the protocols were amended to require submission of every federal case involving a killing, the lack of geographic and substantive uniformity in federal death penalty administration likely would not end, because federal prosecutors have discretion to defer to state prosecution before a federal offense is ever charged.⁵⁶¹ Such declinations are unreviewed, as a general matter, by Main Justice. If the foregoing hypothetical assumptions are accurate, federal prosecutors' discretionary power to *decline* potential death cases sometimes will be exercised, in a natural, good-faith way, so as to skew federal declination decisions on a national level. That is, more "death" cases are likely to be declined by federal prosecutors in anti-death penalty states than in pro-death states. Thus, even if all *charged* "federal offenses subject to the death penalty" were reviewed at Main Justice, unreviewed federal prosecutorial decisions not to charge in some death cases would still likely reflect regional disparity.

"The 98 (sic) defendant difference between the number of cases submitted and the number reviewed reflects cases that are currently pending review (39), cases in which the defendant is a fugitive and review has been deferred (5), cases in which review has been deferred pending the completion of state prosecution (3), cases handled under pre-protocol procedure (11), a case in which the capital charge was withdrawn (1), and cases in which the defendant plead guilty before the completion of review (39)." *Id.*

559. See *supra* notes 397-398 and accompanying text.

560. See *McClesky*, 481 U.S., at 287 (1987) (noting that in the Baldus study, "midrange" cases are those whose facts are neither extremely aggravated nor extremely benign). *BALDUS ET AL.*, *supra* note 180, at 47-59 (describing development of culpability categories), 399 ("racial effects occurred primarily in moderately aggravated, midrange cases in which the defendant's culpability was neither very high nor very low.")

561. See *supra* notes 534-542 and accompanying text.

ii. A Possible Study of Potential Federal Capital Cases

While recognizing disparity in the administration of the federal death penalty and acknowledging the role that prosecutorial discretion plays in the phenomenon is an important step, it is not a solution. And two preliminary objections can be raised. First, it can be argued that *de facto* regional disparity in administration of the death penalty should not be criticized normatively. Second, even if greater national uniformity is desirable, few observers of the criminal justice system believe that elimination of prosecutorial discretion is a possible, let alone desirable, objective. Before proposing a modest program for the DOJ to assemble and study its own capital case data, both these thoughts are briefly addressed.

As to the first contention, this Article rejects the "regional disparity is good" position as simply not within the current stated intentions of Congress or the DOJ for present purposes.⁵⁶² Congress has written a federal death penalty statute which is applicable nationally and contains no express suggestion or endorsement of regional disparities in its implementation. In addition, Congress has set general federal sentencing policy to attempt to eliminate "unwarranted sentencing disparities" among similarly-situated federal defendants.⁵⁶³ This supports the conclusion that regional disparity in capital sentencing is not intended by Congress. Meanwhile, the Attorney General's capital case protocols specify requirements for "all Federal cases" without distinction and explicitly state one purpose of Main Justice review as "consistency."⁵⁶⁴ The very existence of a centralized, national review system for federal capital cases belies any conscious desire to foster or accept regional disparity.

Yet even if regional and substantive disparity in administering the federal death penalty is to be condemned, there is little likelihood that all prosecutorial discretion can be eliminated, and good reason to argue that it should not be. In *McCleskey v. Kemp*, the Supreme Court described the role of prosecutorial discretion in the criminal justice system as "fundamental," and Justice Blackmun, even while dissenting, acknowledged that "prosecutors undoubtedly need discretion."⁵⁶⁵ Professors La Fave and Israel have noted

562. See *supra* notes 21, 425-447 and accompanying text.

563. 28 U.S.C. § 991(b)(1)(B) (1994).

564. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, §§ 9-10.010, 9-10.080. The other stated purpose is to promote "fairness," a term that is generally understood to encompass (but not to be limited to) racial bias concerns. See *id.* § 9-10.080 ("fairness" goal is immediately followed by a direction that "bias . . . based upon . . . race or ethnic origin may play no role" in the death penalty authorization decision).

565. 481 U.S. 279, 311, 363 (1987) (Blackmun, J., dissenting).

that the idea that prosecutorial discretion can produce valued individualized justice is "firmly entrenched in American law."⁵⁶⁶ Courts have defended the basic unreviewability of prosecutorial discretion as "an incident of the constitutional separation of powers."⁵⁶⁷ Even Professor Davis, while powerfully demonstrating the point that "the power to be lenient is the power to discriminate," notes that "practicable" limitations on his suggested regime of articulated standards for prosecutorial discretion "are essential."⁵⁶⁸

But one need not propose elimination of prosecutorial discretion in order to improve the current situation of regional disparity in federal death penalty administration. I agree that elimination of all prosecutorial discretion, even if possible, would likely create more problems than it could solve. More modestly, I propose only a limited "tweak" of the present departmental system. That is, with regard only to potential capital cases, the Attorney General should require reporting of all U.S. Attorney *declinations* of cases in which a non-negligent killing has occurred, for the limited purpose of studying national administration of the federal death penalty. "Declination" should be construed broadly, to encompass all matters in which a member of a U.S. Attorney's office has discussion with law enforcement officials (state, local, or federal) about such a case.⁵⁶⁹ The Department could then review such declination reports for consistency among the various U.S. Attorneys' capital case declination standards. To reduce resistance, such a program could be expressly temporary, say a two-year "experimental" study program that would end once concerns about non-uniform capital declination policies were resolved.

The goal of such a reporting requirement would be, at least initially, an experimental one. The hope would be to generate a truly *national* universe of representative data on "like" potential federal murder cases, and then to stimulate discussion at Main Justice and among all U.S. Attorneys about appropriate standards for determining when to charge murder cases federally. Rather than silently submerging regional differences regarding charging

566. 2 WAYNE R. LA FAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.2(a) (1984).

567. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965). In its most recent opinion on prosecutorial discretion, a majority of the Supreme Court echoed this view when it described the prosecutorial charging power as "a 'special province' of the Executive." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

568. DAVIS, *supra* note 548, at 170, 225 n.28.

569. *See supra* notes 521-526 and accompanying text.

standards in the unreviewed depths of declination decisions, the initial goal of a broad DOJ study would be simply to determine if such differences in fact exist and, if they do, to self-consciously expose them to the light of considered comparison and analysis. If, after study and discussion, the DOJ remained committed to its currently policy of national capital case "consistency,"⁵⁷⁰ then specific, national charging standards — for capital cases only — could be developed and implemented with a broad system of Main Justice review.⁵⁷¹ On the other hand, the Department might decide to accept some degree of regional disuniformity — but it would do so consciously, expressly, and after national (if internal) debate, rather than silently as is presently the case.

Such a program of Main Justice study and review could be entirely internal, at least initially. Professor Zacharias has noted that there are "good arguments" for allowing internal standards for the exercise of prosecutorial discretion to remain non-public.⁵⁷² An initial DOJ program to examine and discuss national standards for the exercise of federal prosecutorial discretion in potential capital cases could profit from the freedom in debate that confidentiality can inspire. The Department should be permitted to alter its internal standards and study these difficult issues without public criticism fueled by the high emotions of the capital punishment debate. If, after study, the Department decided to implement formal changes in its *United States Attorneys' Manual* capital case policies, it could then decide whether to seek some public comment before acting in this sensitive area.

Even if no specific standards for federal charging of capital cases were ultimately adopted, an explicit national dialogue within the Department regarding the exercise of charging discretion for uniformly written federal criminal statutes would be beneficial. It

570. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080.

571. Professor Kennedy has expressed skepticism about prosecutorial standards that realistically "would compel, or even facilitate . . . consistency." KENNEDY, RACE, CRIME AND THE LAW *supra* note 531, at 343. More bleakly (but perhaps with tongue-in-cheek), Professor William Wang has written that "criminal law is hopelessly arbitrary" and that "there is no way of learning how to improve the system." William K.S. Wang, *The Metaphysics of Punishment: An Exercise in Futility*, 13 SAN DIEGO L. REV. 306, 330 (1976). The author is less skeptical, although he does recognize the inevitable indeterminacy and manipulability of language. See *infra* Part II.B.3. But in any case, the more modest proposal suggested here is only that an experimental DOJ study is worth the effort, even if it does not ultimately end inconsistent results, as opposed to the inarticulate silence and consequent silent disparity that un-reviewed discretion currently produces.

572. See Zacharias, *supra* note 475, at 1184-85.

would enable U.S. Attorneys to consciously consider their role as participants in a *federal* system, and to confront what differences may, or may not, exist between that role and the role of a State prosecutor. It is not at all a given that the proper role of a federal U.S. Attorney in the federal criminal justice system is to act purely as an autonomous representative of regional views.⁵⁷³ Indeed, the past courageous role of some U.S. Attorneys in enforcing federal civil rights laws in the face of local antipathy suggests a different, nationalized conception of the federal prosecutor's role. Internal, self-conscious analysis of the federal prosecutor's role in charging potential capital cases, as opposed to the silence of declination discretion, could be a helpful step in considering more broadly what unique elements comprise the role of a federal attorney "for the United States."

Finally, some have argued that one response to review of prosecutorial charging decisions in the capital context could be a "leveling up" that results in more executions.⁵⁷⁴ In other words, if regional uniformity were required in federal capital prosecutions, one possible response could be to *boost* the number of capital cases coming out of currently low-number Districts. For opponents of capital punishment who might otherwise relish an opportunity to articulate limits on prosecutorial discretion, this would be an unsettling result, and one that could engender an uncharacteristic timidity in advocacy. However, I join with Professor Kennedy in believing that explicit recognition of the "obvious but repressed fact" of disuniformity in capital sentencing is "an essential step toward creating a more decent and equitable administration of criminal law."⁵⁷⁵ Fear of one possible, but not at all an inevitable, response ought not deter conscientious federal scholars from confronting legal issues that otherwise plainly would be troublesome.

Moreover, if federal charging standards were to be formulated and adopted on a basis of truly "national consensus," it is far from obvious that the "level up" solution would result. Currently, it is likely that the DOJ's standards for whether to authorize the filing of a federal death penalty notice are being developed (in a com-

573. Cf. Richoff, *supra* note 452, at 504 (noting that a U.S. Attorney's "efforts to respond to the needs of the local communities" can conflict with Main Justice efforts "to execute a cohesive national policy").

574. See KENNEDY, RACE, CRIME AND THE LAW, *supra* note 531, at 341, 344, 347 (noting the argument, not endorsing it); see also Randall Kennedy, McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, 101 HARV. L. REV. 1388, 1433-34, 1436-38 (1988) (same) [hereinafter, Kennedy, *Capital Punishment*].

575. See KENNEDY, RACE, CRIME AND THE LAW, *supra* note 531, at 348.

mon-law way via decisions of the Capital Case Review Committee) based on a skewed sample of cases submitted largely from “pro” death penalty states.⁵⁷⁶ If U.S. Attorneys from “undecided” and “con” states were compelled to participate in this ongoing conversation, rather than silently “opting out” as some of them may now be doing by declining potential capital cases or not submitting them for review, it seems likely that the overall standards for when to charge federal cases as death penalty cases would rise. Higher, more stringent standards would result because anti-death penalty prosecutors, who are currently all but silent in the debate, would be forced instead to actively participate in the development and implementation of national death penalty standards, because they would know that *their* potential capital cases would actually be subjected to the resulting Main Justice standards. At the very least, some compromise standards between the “pro” and “con” U.S. Attorneys would result, which presumably would be more stringent than the standards being set *de facto* today by the skewed pool of submissions. Indeed, if “lowest common denominator” capital case standards were adopted — that is, standards that *every* U.S. Attorney could accept — they would likely represent an even higher standard for charging federal death penalty cases. The likely result would be that while some federal capital cases not currently being charged might emerge from the “con” districts, an opposite number of currently charged capital cases from “pro” districts would disappear, because they would fall below the newly minted national charging standards. One can hardly predict whether the final total number of federal capital prosecutions would be lower or higher. But one can at least anticipate, with approval, the prospect of a more nationally uniform federal death penalty administration, with its basic prosecutorial premises expressly articulated rather than silently derived by default.

2. *The Disturbing Persistence of Racial Disparity*

When the available statistics regarding the race of federal capital defendants are added to general concerns of disparity in administration of the federal death penalty, a need for greater Main Justice attention to the issues of prosecutorial discretion is evident.

The persistent presence of statistical racial disparity – if not outright race bias—in capital punishment administration almost cer-

576. See *supra* notes 485-493 and accompanying text.

tainly produced *Witherspoon*⁵⁷⁷ and *Coker*,⁵⁷⁸ played a strong role in *Furman*,⁵⁷⁹ was optimistically part of *Gregg*,⁵⁸⁰ and yet was recognized as unremitted a decade later in *McCleskey*.⁵⁸¹ The set of compromises that evolved over a decade to produce the 1994 FDPA was, at least in part, the product of a quarter-century of concern regarding race in capital punishment. Although opponents of capital punishment still decry the new federal legislation,⁵⁸² the 1994 FDPA was probably the best that could be accomplished, within the prevailing constitutional limitations and political realities, to guide discretion unbiasedly and attempt to eliminate race as a factor in federal capital cases. A strong congressional policy against racial bias in capital sentencing was enacted into federal law, and the new federal statute incorporated a number of protections not found in various state capital punishment laws, such as express instructions to the jury not to consider race and mandatory sworn jury declarations to that effect.⁵⁸³ Indeed, it was the supporters of capital punishment who criticized the 1994 federal legislation as too “pro-defendant” to be effective.⁵⁸⁴

577. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

578. See *Coker v. Georgia*, 433 U.S. 584 (1977).

579. See *Furman*, 408 U.S. 238.

580. See *Gregg*, 428 U.S. 153.

581. See *McCleskey*, 481 U.S. 279 (noting that the NAACP filed a supportive brief in *Witherspoon*); *Coker*, 433 U.S. at 585 (case briefed and argued by NAACP attorneys); see also JEFFRIES, *supra* note 128, at 437 (noting that the “explosive issue” of race discrimination in the imposition of the death penalty was “lurking behind” *Coker* and other death penalty challenges). In *Furman*, a number of Justices expressed their concern about racial disparity. See 408 U.S. at 249-53 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 364 (Marshall, J., concurring). In *Gregg*, the controlling Justices expressed optimism that the new, approved system would “escape the infirmities which invalidated its previous system under *Furman*.” See *Gregg*, 428 U.S. at 222 (White, J., concurring); see also *id.* at 206-07 (concluding that a system of guided discretion and appellate review provides “assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree”).

Yet, over a decade later in *McCleskey*, the Court assumed as “valid” the statistical evidence of the Baldus study that race played a disparate role in the imposition of capital punishment in Georgia, see 481 U.S. at 286-87, 291 n.7, and also that the Georgia State Legislature was aware of the racially discriminatory effect of the state’s capital punishment system. *Id.* at 297-98. Cf. *Furman*, 408 U.S. at 450 (Powell, J., dissenting) (contending that “standards of criminal justice have ‘evolved,’” and that “[t]he possibility of racial bias in the trial and sentencing process has diminished in recent years”). Professor Jeffries reports that after Justice Powell retired, he changed his mind regarding capital punishment and came “to think that capital punishment should be abolished.” JEFFRIES, *supra* note 128, at 451.

582. See generally Bright, *supra* note 451; Chemerinsky, *supra* note 218.

583. See Special Precaution To Ensure Against Discrimination, 18 U.S.C. § 3593(f) (Supp. 1998). See *supra* notes 214-218 and accompanying text.

584. See *supra* note 219.

Subsequently, an Attorney General who is opposed to capital punishment as a personal matter⁵⁸⁵ and is the first in the post-*Furman* generation to administer a general array of federal death penalty statutes, has established a high-level death penalty review system at Main Justice that is consciously race-blind. An express goal of this review system is to ensure that "bias . . . based on characteristics such as race or ethnic origin . . . play[s] no role in the decision whether to seek the death penalty."⁵⁸⁶

Critics, however, are unimpressed. The fact that the Racial Justice Act was ultimately dropped from the three-bill package that the House passed in 1994⁵⁸⁷ was a large defeat for advocates of greater protections against racial bias. The Racial Justice Act would have legislatively "overruled" *McCleskey* and made racially-disparate capital punishment statistics actionable, although not dispositive.⁵⁸⁸ In contrast, critics find the anti-discrimination provisions in the FDPA to be ineffective and "almost laughable."⁵⁸⁹

Meanwhile, despite the avowed goal of race-blind capital punishment administration, statistical race disparity persists in federal death penalty prosecutions. The public statistics consist of a very small sample, and they include pre-1995 cases filed under the 1988 CCE statute without race-blind DOJ review. Nevertheless, they are disappointing to say the least.⁵⁹⁰ In terms of the end result, thirteen of the twenty people currently on federal death row are black, two others are non-Caucasian, and five are white.⁵⁹¹ This 65% African-American (75% minority) distribution is far worse than the *states'* ethnic distribution for death row prisoners, which

585. See *supra* note 316 and accompanying text. In this sense Attorney General Reno echoes Justice Powell, who wrote that while he would personally oppose capital punishment legislation if he were a legislator, he could not vote to condemn it in his role as a federal judge. JEFFRIES, *supra* note 128, at 451.

586. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080.

587. See *supra* note 223 and accompanying text; Chemerinsky, *supra* note 218, at 529-30 (noting that although the Racial Justice Act had passed the House as part of the larger crime bill, it would have caused a filibuster in the Senate and the Democratic administration ultimately agreed to its removal in order to secure passage of the overall bill).

588. Chemerinsky, *supra* note 218, at 520, 530-31.

589. Bright, *supra* note 451, at 464 (describing the anti-discrimination provisions in the federal death penalty statutes as "almost laughable").

590. Cf. *id.*, at 434 (stating that despite "[n]ew capital punishment laws, supposedly designed to prevent arbitrariness and discrimination, . . . race and poverty continue to determine who dies").

591. See *Federal Death Row Prisoners*, *supra* note 6.

nationally as of December 31, 1997, was over 56% white (1,871 of 3,315).⁵⁹²

With regard to Main Justice authorizations for death penalty prosecutions, the early data was not promising. In 1994 (prior to Attorney General Reno's protocol and only a year into her tenure), the House Judiciary Committee reported that "of 36 defendants against whom a Federal death penalty has been sought since 1988, 4 defendants were white, 4 were Hispanic, and 28 were black. All 9 of the defendants approved for capital prosecution in the past year [presumably by Attorney General Reno but prior to establishment of the review system] have been black."⁵⁹³

More recently, filings in two federal court cases have revealed similarly unbalanced DOJ authorization figures (although neither court ultimately found impermissible race discrimination).⁵⁹⁴ In *United States v. Heatley* in the Southern District of New York, in response to a court order, the Department revealed that of 296 defendants submitted for capital case review between January 27, 1995, and August 10, 1998, 55% were African-American and 80% were non-white.⁵⁹⁵ Similar percentages resulted among the eighty-one defendants actually authorized for death penalty prosecution: 57% were African-American and 72% were non-white.⁵⁹⁶ Since the authorization process at Main Justice is race-blind,⁵⁹⁷ it is not surprising that the authorization figures roughly reflect the ethnicity percentages in submissions. This indicates, however, how vital

592. CAPITAL PUNISHMENT 1997, *supra* note 494, at 1.

593. H.R. REP. NO. 103-458, at 3, 103rd Cong. 2d Sess. (March 24, 1994). With regard to imposition of the death penalty nationally, both by state and federal courts, the House Report concluded that "disturbing patterns [of racial disparity] are clearly established." *Id.* at 2. It is important to note that while the Baldus study did not find that race-of-defendant discrimination was statistically significant in Georgia, *see* BALDUS ET AL., *supra* note 180, at 185, other studies have reported that discrimination occurs along racial lines with regard to defendants as well as victims. *See* H.R. REP. 103-458, at 3; 1990 GAO REPORT, *supra* note 180, at 6 (of the 28 studies it reviewed, "more than half . . . found that the race of the defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty"); *see also* SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 53 (1989).

594. *See* *United States v. Holloway*, No 3:96-00004 (M.D. Tenn.), Memorandum Op., Dec. 3, 1998, in reported in 64 CRIM. L. RPTR. 231 (BNA, Dec. 23, 1998); Letter from Joseph S. Uberman, DOJ Narcotics and Dangerous Drug Section, to Assistant U.S. Attorney Andrew S. Dember (Aug. 13, 1998) filed in *United States v. Heatley*, No. 511-96-CR-515 (ss) (transmitting data).

595. *See* Letter from Joseph S. Uberman, *supra* note 594.

596. *Id.*

597. *See infra* notes 344-347.

it is to examine the *submission* standards for DOJ capital case review.

In *United States v. Holloway*, a federal death penalty prosecution in Nashville, Tennessee, an attorney for the Federal Death Penalty Resource Center filed an affidavit reciting similar figures for Main Justice authorizations over a longer period, spanning at least three Attorneys General. Of the 133 defendants authorized for federal death penalty prosecution over the decade from 1988 (when the CCE procedures were enacted) to October 1998, 59% were African-American and 76% were non-white.⁵⁹⁸

Of course, after *McClesky* such statistical data, by itself, cannot prove intentional race discrimination in the capital context.⁵⁹⁹ Moreover, because the authorizing officials at Main Justice are unaware of race when they decide, intentional race discrimination in that process would seem impossible. Finally, much additional data, including race of victims and the specific facts of each submitted case, would have to be examined before even tentative conclusions regarding the selection of federal capital defendants could be made.

Nevertheless, the bare statistics are disturbing. Far more black than white defendants are being submitted for DOJ capital case review and are being authorized for capital prosecution. Over three-quarters of the residents on federal death row are non-white. Statistics like these have led Stephen Bright to opine that “[t]he United States DOJ, which might be expected to be concerned

598. Affidavit of Kevin McNally (Oct. 14, 1998) filed in *Holloway*. The numbers recited by McNally (which are not official DOJ figures but which the government did not dispute in *Holloway*) were 78 African-American defendants, 32 Caucasian, 17 Hispanic and six Asian or Indian. *Id.* Gender is also identified in this affidavit, and there appears to have been only one woman authorized for federal death penalty prosecution since 1988, Tamara Llamas in the Eastern District of North Carolina, in 1997. Interestingly, the white defendant in *Holloway* was arguing that because the Department of Justice has been publically criticized for the high percentage of African-American capital authorizations, “the government is selecting *whites* for death penalty prosecution” at higher rates than blacks “in order to appease congressional concerns . . . [,] eliminate the clearly skewed racial pattern . . . [and] even the numbers.” *Holloway*, Supplemental Submission of Defendant, at 4 (Nov. 5, 1998). As noted, the district judge in *Holloway* rejected this claim, finding that no “similarly situated” federal capital cases had been shown and that no evidence of discriminatory intent had been proffered. See 64 CRIM. L. RPT. 231 (BNA, 1998).

599. See 481 U.S. at 243-47, 308, 312-13.

about racial discrimination in the courts . . . is now one of the worst offenders in the discriminatory use of the death penalty.”⁶⁰⁰

Tangentially, it is interesting to note that it was not always this way. Of the thirty-four federal prisoners actually executed from 1927 through the last federal execution in 1963, twenty-seven, or 79%, were white.⁶⁰¹ This cannot be entirely explained by the “white collar” character of federal crimes; while eight of the thirty-four federal executions were for acts of wartime sabotage or espionage, the others were largely for murder, rape or kidnapping, all violent and normally “dual jurisdiction” state crimes.⁶⁰² Further study of the history of the federal death penalty administration before *Furman* might prove interesting.

The post-1988 federal statistics surely constitute far too small a sample, not to mention one that is unanalyzed for myriad variables, to support anything other than an anecdotal “feel” for how the federal penalty is being administered. Nevertheless, two assertions about the federal statistics can be made with confidence: (1) because the centralized review process is “race blind,” we know that the Main Justice death penalty *authorization* decisions are not motivated by race bias,⁶⁰³ and (2) the Supreme Court’s decision in *McCleskey v. Kemp* renders the statistics virtually irrelevant at the constitutional level.⁶⁰⁴ Although the emerging federal statistics are

600. Bright, *supra* note 451, at 466. This charge is extreme and, to the extent it suggests the DOJ is not concerned, inaccurate. But the public perception, like the data itself, cannot be ignored.

601. *Executions of Federal Prisoners 1927-1998*, *supra* note 111. Three of the federally executed were black, two were American Indian, and one was of unknown race. Two (Ethyl Rosenberg and Bonnie Hedy, both executed in 1953) were female. *See id.*

602. Some of these crimes were committed in exclusively federal jurisdiction locations (high seas, Indian reservations) and some were murders of federal officials, often viewed as appropriate for federal prosecution. *Id.* *See also supra* note 458 (noting arguably stronger federal interest in prosecuting murderers of federal officials). But while these facts may explain why the cases were charged federally, they bear no obvious relation to racial identity.

603. Although I can personally report confronting an odd, unconscious race concern of my own while serving on the Committee. In one particular case, I experienced a sense of relief upon learning, after authorizing a death penalty prosecution, that the defendant was white. It was then that I realized that some portion of my own uneasiness about authorizing the penalty in that particular case (from a border state) arose out of a fear that the defendant was black and possibly the victim of some racial bias. This is race-consciousness, however benign. (I should note, however, that the bulk of my uneasiness in this particular case was a factual concern that the aggravating factors being proposed were not firmly made out on the facts.).

604. *See McCleskey*, 481 U.S. at 297 (holding that an “inference from the [statistical] disparities” is “clearly insufficient”); *id.* at 299 (holding that an “inference from the [statistical] disparities” does not prove “discriminatory purpose”); *id.* at 313 (stat-

not inconsistent with Baldus' and others' data,⁶⁰⁵ after *McCleskey* a purely statistical demonstration of racial disparity in the imposition of capital punishment is relegated to the realm of "disturbing but not unconstitutional."⁶⁰⁶

Others have eloquently presented critiques of *McCleskey*, although not always criticizing its result. For instance, Professor Kennedy has described the Court's decision as a "failure of will" and noted that the Court "could have decided differently" based on available precedents.⁶⁰⁷ Critical of all the opinions in the case, he describes the majority's as "the worst of the lot."⁶⁰⁸ Stephen Bright has more vehemently described *McCleskey* as a "badge of shame upon America's system of justice," deserving "universal and scathing criticism."⁶⁰⁹ More recently, Professors Evan Lee and Ash Bhagwat have written that *McCleskey*'s "reasoning reflects a profound misunderstanding of the nature of statistical evidence

ing that "the Baldus study does not demonstrate a constitutionally significant risk of racial bias . . ."). *Accord* BALDUS ET AL., *supra* note 180, at 408 (stating that *McCleskey* "limit[s] the usefulness of statistical evidence").

605. See generally BALDUS ET AL., *supra* note 180.

606. This description is my own; cf. GROSS & MAURO, *supra* note 593, at 212 ("The central message of the *McCleskey* case is all too plain: de facto racial discrimination in capital sentencing is legal in the United States . . . [and] even the most conservative reading [of the decision] . . . is extremely disturbing."). "Disturbing but not unconstitutional" is not an uncommon legal position. Rather, it reflects descriptions that some would offer of many of the aspects of the criminal justice system that are bounded only by the "floor" of indeterminate constitutional phrases such as "due process" or "equal protection." See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding that police car chases that are reckless and ultimately fatal do not "shock the conscience" so as to violate due process); *Kirby v. Illinois*, 406 U.S. 682 (1972) (limiting right to counsel to post-charge proceedings); *Schmerber v. California*, 384 U.S. 757 (1966) (permitting compelled drawing of blood). Legislatures are free to raise the constitutional floor in such areas — the Racial Justice Act would constitute such a floor-raising — but courts may not independently enact more restrictive policy views.

As the Court noted in *McCleskey*, "there is no limiting principle to the type of challenge brought by *McCleskey*," and his "claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." 481 U.S. at 318, 314-15. Rather than open the door (some would say flood-gates) to such disturbing issues, the Court simply noted that the death penalty has been accepted by the Court and the political majority, and ruled that "the Constitution does not 'plac[e] totally unrealistic conditions on its use'." *Id.* at 319 (brackets in original) (quoting *Gregg*, 428 U.S. at 199 n.50). But this is simply *ipse dixit* reasoning, no matter how sensible it may seem to many. Concluding that "*McCleskey*'s arguments are best presented to the legislative bodies" simply states, rather than explains, the decision. *Id.* at 319. The *McCleskey* Court simply seemed unwilling to interfere with the administration of a popular, persistent, and historically well-accepted punishment, no matter how disturbing the equally persistent racial disparities may be.

607. KENNEDY, RACE, CRIME AND THE LAW, *supra* note 531, at 339-40.

608. *Id.* at 335.

609. Bright, *supra* note 451, at 480.

and of discretion.”⁶¹⁰ Rather than repeat existing critiques, I seek here to contribute only two modest thoughts: first, to endorse and enlarge upon Professor Kennedy’s insight that unconscious “empathy” may underlie much of the statistical racial disparities,⁶¹¹ and second, to suggest again that wider review and more explicit, probing discussion of potential capital cases at Main Justice might yield a more racially-neutral federal death penalty process.

In grappling with what he describes as “the *McCleskey* problem” in his book, *Race, Crime and the Law*,⁶¹² Professor Kennedy does not accuse the criminal justice system of overt or conscious racial discrimination. Rather, in a brief discussion at the end of his death penalty chapter, Professor Kennedy uses the phrase “willful blindness” to describe the unintentional, unconscious, empathetic reaction of white prosecutors (among others) to perpetrators and victims of crime.⁶¹³ Noting that many jurisdictions are “dominated by whites” in criminal justice decision-making positions,⁶¹⁴ he asserts that “in a substantial (albeit hard to specify) number of instances, individuals in America — police and prosecutors, judges and jurors, editors and readers — react more to the murder of white than black persons.”⁶¹⁵ He invokes the concept of “empa-

610. Ashutosh Bhagwat & Evan Tsen Lee, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 S. CT. REV. 111, 122. See also Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420 (1988).

611. See KENNEDY, *RACE, CRIME AND THE LAW*, *supra* note 531, at 347, 349.

612. *Id.*

613. *Id.* at 348. In his earlier work, from which this chapter is derived, Professor Kennedy expressly noted Paul Brest’s influential Article, *infra* note 620, as the foundation for his own thought. *Id.* at 147. See also Kennedy, *Capital Punishment*, *supra* note 574, at 1420.

614. KENNEDY, *RACE, CRIME AND THE LAW*, *supra* note 531, at 349; *accord*, Bright, *supra* note 451, at 449-50.

615. KENNEDY, *RACE, CRIME AND THE LAW*, *supra* note 531, at 348. This observation has roots in, among other sources, an Article published by Kennedy’s former Harvard colleague, Professor Derrick Bell, over 20 years earlier. See Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?* 61 CAL. L. REV. 165 (1973). Ten years later, two psychologists credited Bell with the observation that “the lack of similarity between the attitudes of [criminal] defendants and those of other participants in the criminal justice system may be the most influential factor in the treatment of black defendants.” Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants’ and Victims’ Characteristics on Jurors’ Verdicts*, in *THE PSYCHOLOGY OF THE COURTROOM* 83, 107 (Norbert L. Kerr and Robert M. Bray eds., 1982).

thy" twice and notes that the phenomenon is not confined to race relations.⁶¹⁶ Rather, says Professor Kennedy, all humans evaluate "human life according to clannish criteria:" people we know, people from our local community, people from "our side" or our team or our state are, without reason other than their relative familiarity to us, valued over strangers.⁶¹⁷

Unconscious racial identification with white defendants and/or victims by white prosecutors, judges and jurors, and a concomitant failure to identify or empathize with strangers from other racial groups, is not purposeful, immoral, or bad faith race discrimination. Rather it is, in Kennedy's words, "a universal dilemma in human relations."⁶¹⁸ Professor Kennedy appears to seek to diffuse the accusatory rhetoric of labeling unconscious race empathy as "bias," discrimination, or racism, all of which bear connotations of bad faith. Explicit recognition of a more benign and unconscious, if just as insidious, phenomenon would, Professor Kennedy concludes, "facilitate a more candid discussion" of the influence of race in administration of the death penalty and help us "change the realities of racial sentiment in American life."⁶¹⁹

I propose to call this phenomenon "unconscious racial empathy." Professor Kennedy is not the first to note this phenomenon or to rely on it to explain persistent race disparities in capital punishment. Professor Charles Lawrence III seminally advanced the concept in a 1986 article,⁶²⁰ and others have followed his insights (whether consciously or not).⁶²¹ In fact, the Baldus study clearly

616. KENNEDY, RACE, CRIME AND THE LAW, *supra* note 531, at 347-48 (noting that "authorities do respond with less vigor and empathy to black-victim homicides"); *see also id.* at 349 ("It should come as no surprise . . . that . . . officials respond more empathetically to white than black victims of crime.").

617. *Id.* at 349-50.

618. *Id.* at 350.

619. *Id.*

620. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Professor Lawrence credits Richard Wasserstrom for explicating a similar concept a decade earlier. *See id.* at 342-43 (citing Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 599 (1977)). *See also* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976) (defining "racially selective sympathy and indifference" as an "unconscious failure to extend to a minority the same . . . sympathy and care given . . . to one's own group"). *See generally* Martha Minow, *Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (examining conscious and unconscious uses of "differences" in much constitutional analysis).

621. *See, e.g.,* Bhagwat & Lee, *supra* note 610, at 120-21, 155 ("Most prosecutorial discrimination . . . is probably unconscious"); David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1284 (1995) (asserting an "unconscious ra-

advertises to the phenomenon of unconscious racial empathy among prosecutors, although only in passing.⁶²²

I want to echo and underscore two aspects of Professor Kennedy's discussion. First, explicit, purposeful race discrimination is seldom, if ever, seen in the federal prosecutorial ranks, even behind closed doors and even in those states where it might stereotypically be expected. I have never seen it during eight years as a federal prosecutor, including during intensive litigation instruction of federal prosecutors from virtually every state in the Union.⁶²³ Because it is more accurate and also because it decreases the accusatory tone of the debate, an explicit recognition that race bias can be subtle and entirely unconscious would be an extremely useful step forward in addressing the exercise of prosecutorial discretion in the criminal justice system.⁶²⁴

Second, and in some contrast, I think Professor Kennedy is entirely correct that the psychological phenomena of "empathy" — unconscious racial identification — can explain much of the race disparity in the exercise of prosecutorial discretion that he and the

cism on the part of Congress" in setting crack cocaine penalties) and 1307 ("The danger of unconscious racism"); Bright, *supra* note 451, at 436-38, 451-52; Carter, *supra* note 610, at 442-44 (noting the "unconscious racialism that pervades the criminal justice system.").

622. BALDUS ET AL., *supra* note 179, at 66, 79 n.59 ("prosecutors and jurors . . . influenced by race . . . are in most cases probably quite unaware of the connection. . . .")

623. Accord Sklansky, *supra* note 621, at 1289 n.29 ("I saw no evidence of race affecting charging decisions during my tenure as a federal prosecutor."). Of course, not seeing it does not mean it doesn't exist; but it supports the idea that racial bias is either hidden or unconscious (or both). My experience as an instructor of federal prosecutors has occurred through the DOJ's "Attorney General's Advocacy Institute," which draws federal prosecutors from every district in the country to Washington for programs taught by knowledgeable federal prosecutors. It has included instruction in advocacy techniques, where race bias might be thought likely to be exhibited; and the instruction programs are closed to non-Departmental employees, so that prosecutors might feel "safe" exhibiting bias. It is also a reality that most of the Assistant U.S. Attorneys I have instructed have been white, and that the AGAI courses include a certain amount of relaxed nighttime socializing — again, facts that might lead race bias if present to manifest itself. I repeat: I have not seen it.

624. Professors Bhagwat and Lee "concede it may be controversial to use the word 'racism' to describe such unconscious racially influenced behavior," but they pass the issue, saying that "[t]erminology . . . is beside the point." Bhagwat & Lee, *supra* note 610, at 120 n.34. Terminology may well have been beside the point of their article, but I think it very much to the point in the debate regarding how to address persistent race disparities in the administration of capital punishment. We must be thoughtful in our use of language if we seek actually to influence courts, prosecutors, and other criminal justice decisionmakers who may take umbrage at more accusatory labels (particularly when they are also inaccurate descriptors).

Baldus studies believe to exist.⁶²⁵ "Empathy" has its origins in the Greek "en pathos," meaning "in suffering," and is a well recognized psychological phenomenon of "imaginative projection of one's own consciousness into another being."⁶²⁶ It is similar to other familiar phenomena, such as personal "identification" with other people who are similar to oneself, or "sympathy" for other people by "imagin[ing] oneself in the sufferer's predicament."⁶²⁷ Psychological literature is rich with accepted demonstrations of the intuitive knowledge that persons identify with and empathize with other persons "like" them or from their community.⁶²⁸ Identification and empathy with one's own racial group — and concomitant difficulty in empathizing or identifying with racial groups or cultures not one's own — are concepts so well established they might be described as basic premises of human nature.⁶²⁹ Indeed, one body of legal literature is broadly premised on acceptance of the concept of empathy: jury selection and the bedrock belief that jurors will identify and sympathize with persons like them, so that advocates should consciously try to pick jurors "like" their client.⁶³⁰

625. See KENNEDY, RACE, CRIME AND THE LAW, *supra* note 531, at 343, 331, 349.

626. WEBSTER'S NEW INT'L DICTIONARY (2d ed. unabridged 1954). Rather than further burden this Article with massive citations to literature discussing empathy, reference to the wealth of material found in Professor Lynne N. Henderson's comprehensive article should be made by the interested reader. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1578-87 (1987). Also relevant here is Professor Henderson's statement that she "cannot empathize totally with the pain of blacks . . . because I am white." *Id.* at 1585. She also describes "'unreflective' empathy" a concept similar to that described in the text. *Id.* at 1584.

627. Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 7 (1997); Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 890 (1996) (noting that empathy is distinguished from sympathy although it is a "necessary precondition").

628. Professor Lawrence provides a wealth of psychological as well as intuitive discussion to support the concept of unconscious racism. See Lawrence, *supra* note 620, at 328-44; accord Henderson, *supra* note 626.

629. This is not to say, however, that persons are unable to empathize with members of other races or cultures. In fact, cross-cultural and cross-racial empathy is well recognized. See Linder, *supra* note 627, at 890. The weaker, albeit still significant, point is that people are more likely to empathize with others from their own group than with persons who are different, if a choice must be made (as it must be in multi-racial homicide cases).

630. See HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* 194 (1966, Phoenix ed. 1971) (stating that "[i]n many instances the jury reaction . . . rests on empathy of one human being to another"). Indeed, this phenomena plainly underlies the long-standing practice — now constitutionally condemned, ironically so in contrast to *McCleskey* — of seeking to strike potential jurors of the defendant's race (by prosecutors) or not of the defendant's race (by defense counsel). See *Batson v. Kentucky* 476 U.S. 79 (1986).

Acceptance of a concept of unconscious racial empathy gives new meaning to Kenneth Culp Davis' famous observation that "the power to be lenient is the power to discriminate."⁶³¹ For it is in the exercise of leniency that prosecutors produce racially disparate capital punishment statistics. Not filing capital charges and accepting non-death guilty pleas are beneficent acts in the minds of prosecutors. By declining to charge, or accepting pleas from, white males they can identify with,⁶³² or by aggressively pursuing capital charges when the victim is white, white prosecutors act not out of bad motive but rather from benign, understandable human feelings of empathy. But meanwhile, minority defendants and victims do not benefit as often from such discretionary acts flowing from empathy. There is no conscious discrimination here — but the inevitable result is like asking volunteers for the death penalty to step forward, and then helping the whites to take one step back.⁶³³ Left standing and exposed are black defendants and victims. In this manner, racial disparities such as those detected by Baldus and other studies⁶³⁴ are created without a hint of the "purposeful discrimination" that the *McCleskey* court held to be a constitutional *sine qua non*.⁶³⁵

631. DAVIS, *supra* note 548, at 170.

632. Because women are generally absent from the class of capital defendants, except in rare and usually very aggravated cases, I assume a male death-eligible defendant in text.

633. Indeed, a stark example of unconscious racial empathy, while of course possibly explicable by other factors, could be the differing results in *McCullah* and *Jones*. In both cases the appellate courts found that the jury had improperly been allowed to consider impermissible, duplicative aggravating factors. Yet the *McCullah* court, addressing a white defendant, vacated the death sentence, while in *Jones*, where the defendant was black, the court affirmed the death sentence and found the error to be "harmless." Interestingly, neither court mentioned the defendant's race — it was not (consciously) relevant to the legal issues. The race of the defendants is revealed in the Death Penalty Information Center's data, see *Federal Death Row Prisoners*, *supra* note 6.

634. See BALDUS ET AL., *supra* note 180, at 280-305 (discussing other studies); Bhagwat & Lee, *supra* note 610, at 114 n.11 (noting other studies); 1990 GAO REPORT, *supra* note 180, at 5. The phenomenon of unconscious racial empathy is also consistent with my own anecdotal observations as a federal prosecutor.

635. 481 U.S. at 292, 298-99. See Linder, *supra* note 627, at 893 ("Empathy may . . . explain the persistence of racism."). The majority opinion in *McCleskey* readily acknowledged that, "[o]f course, the power to be lenient is the power to discriminate." *McCleskey*, 481 U.S. at 312 (quoting DAVIS, *supra* note 548, at 170). But without further analysis, the Court then noted only that "a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'" *Id.* at 312 (quoting *Gregg*, 428 U.S. at 200 n.50.) The Court said nothing more on this point. Yet 15 pages earlier, the Court had conceded that if statistics showed a 100% correlation between race and discretionary prosecutorial relief in capital cases, the Court would grant constitutional relief: it simply demanded

Recognition of a concept of unconscious racial empathy can help to explain not only racial disparities in capital punishment, but also the intriguing point noted by Baldus that there is no significant racial disparity in homicide cases that are ranked as most culpable or most aggravated, nor with respect to those ranked as least aggravated (although still death-eligible). That is, prosecutors and juries make consistent choices between life and death in such "low-end" and "high-end" cases "regardless of racial factors."⁶³⁶ This demonstrates that unconscious racial empathy may be a strong, but not overwhelming, force. When facts in aggravation, or their absence, are clear and extreme, prosecutors and juries acting in good faith can see beyond their incipient racial identification impulses to the clarity of the correct result. However, in "close" cases, when facts in aggravation or mitigation leave fact finders as uncertain (either because the facts are not extreme or because competing factors tug forcefully in both directions),⁶³⁷ unconscious empathy with same-race defendants or victims, or a failure to empathize with different-

"exceptionally clear proof" before "infer[ing] that [prosecutorial] discretion has been abused." *McCleskey*, 481 U.S. at 297. Thus, in fact, direct evidence of "purpose" is not demanded in *McCleskey*, but rather only "the clearest [inferential] proof." Why such a high proof standard was imposed here, as opposed to other important social contexts, was not further developed. The Court, however, seemed to lack the psychological explanation of the inferential link that empathy can provide between acts of leniency and race discrimination. Indeed, the fact that these two passages occurred 15 pages apart in the Court's opinion is one indication of how unlinked they were in the Court's perception of the case. But if the power and commonality of racial empathy is accepted, it can provide persuasive evidence that racial bias is at work. *Accord* Bahgwat & Lee, *supra* note 610, at 117-21 (arguing that "purpose" must mean "causation" in the Equal Protection context and that, so understood, it was well proven in *McCleskey*).

A rather stunning discovery after the opening of Justice Marshall's papers in 1993 provides an ironic denouement to *McCleskey*. See Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1036 (1994). In an internal memorandum to the Court regarding the *McCleskey* case, Justice Scalia wrote that "it is my view that *unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions* is real, acknowledged in the decisions of this Court, and ineradicable." See Chemerinsky, *supra* note 218, at 528 (quoting the memorandum in full) (emphasis added). When this view is added to those of the four *McCleskey* dissenters, it appears that a majority of the Court agreed that race discrimination had been proven by *McCleskey*. But in the published disposition, Justice Scalia ultimately remained silent. The irony of the Court's rejection of *McCleskey's* claim on the ground that discriminatory "purpose" was not proved is stinging.

636. BALDUS ET AL., *supra* note 180, at 144.

637. Baldus and his associates call such cases "midrange" cases, because they fall in the middle ranges of their various culpability indices. See BALDUS ET AL., *supra* note 180, at 85-96, 401-02.

race defendants or victims, can make the difference. Thus the fact that, in Professor Baldus' words, "patterns of racial disparity" manifest themselves "primarily in cases in the mid-aggravation range"⁶³⁸ can be explained not only by the classic "liberation hypothesis" of Professors Kalven and Zeissel,⁶³⁹ but also by the phenomena of unconscious racial empathy.⁶⁴⁰

Turning back, now, to the administration of the federal death penalty, the question becomes what can the DOJ do to guard against the unintentional, yet insidious, effects that unconscious racial empathy may have on the exercise of federal prosecutors' discretion in capital cases. Again, an initial answer would seem to lie in the direction of broader review of potential capital cases, declinations, and plea bargains,⁶⁴¹ as well as development of specific, racially-neutral standards for the filing of federal death penalty charges. The Attorney General and her protocols are avowedly concerned that racial factors play "no role" in federal death penalty decision making.⁶⁴² But if unconscious racial empathy is affecting decisions in the field to decline or accept certain murder cases as federal cases, or to later accept non-death pleas or not, Main Justice reviewers must be aware of the entire universe of cases in which such unconscious effects might manifest themselves before they can address them.⁶⁴³

Again, a temporary, experimental study founded on expanding the category of required Main Justice submissions to all potential federal capital cases could prove useful.⁶⁴⁴ This would include all charged cases in which a death resulted, as well as all *declinations* of such cases. After review of all such cases over a sufficiently long period, the Department could attempt to develop race-neutral

638. *Id.* at 145.

639. *Id.* at 145, 403; see KALVEN & ZEISEL, *supra* note 627, at 164-67 (When the evidence is close, "[t]he closeness of the evidence makes it possible for the jury to respond to . . . sentiment by *liberating* it from . . . the evidence;" "doubts about the evidence free the jury to follow sentiment.") (emphasis in original).

640. Or less grandiosely, the concept of unconscious racial empathy advanced here and by Professor Kennedy is merely a different way of describing Kalven and Zeisel's hypothesis. See *supra* note 630 (noting that Kalven and Zeisel discuss juror empathy).

641. See *supra* notes 375-77 and accompanying text.

642. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12, § 9-10.080.

643. Again, it must be noted that the Department can do nothing to control such influences on other actors, such as judges and jurors, in the system. Thus racially disparate statistics might still result no matter how race-neutral the decisions of federal prosecutors are.

644. See *infra* Part II.B.2.

evaluative standards.⁶⁴⁵ Whether manageable, specific, and useful linguistic death penalty standards can ever be developed is debatable; I briefly examine that issue below.⁶⁴⁶ Surely the effort would be difficult, resource intensive, and for the DOJ, unprecedented. Yet the initial race statistics generated by the Department's efforts to administer the new federal death penalty without bias — 76% of its death penalty authorizations and fifteen of twenty federal death row occupants are non-white — are discouraging. For an Attorney General committed to the concept of racial equality in the justice system, and a Congress that endorsed a bias-free capital punishment system when it enacted the FDPA, the cost and effort of at least an experimental program to attempt broad case review and development of specific capital case standards ought to be worth it, even if success is not guaranteed.

3. *The Inevitable Manipulability of Language*

Aside from uneven submissions and racially disparate results, a final problem I observed while serving on the Attorney General's Capital Case Review Committee turns on the inevitable manipulability of linguistic standards. By this I mean that so long as the selection process for which murderers live and die depends on application of written "narrowing" factors, the selection process will remain somewhat arbitrary because all language can be manipulated by talented lawyers. For example, "especially heinous," even if defined as involving "serious physical abuse,"⁶⁴⁷ can be made by skillful employment of language to apply, or not, to virtually any intentional killing. Similarly, creative writing can make almost any murder seem committed "for pecuniary gain," depending on how far the inferential chain of motivations is permitted to reach. Thus written capital punishment standards are "different in different men," which is what Lord Camden described as "the law of tyrants."⁶⁴⁸

645. One possible way to begin to do this would be to ask hundreds of federal prosecutors across the country to respond to race-neutral (and also racially mixed) capital charging and bargaining hypotheticals. Another would be to ask U.S. Attorneys from around the country to comment on drafts of specific, race neutral, capital-charging standards, in the factual context of real cases that the Department has reviewed.

646. See *infra* Part II.B.3.

647. See 18 U.S.C. § 3592(c)(6) (Supp. II 1996).

648. *McGautha v. California*, 402 U.S. 183, 285 (Brennan J., dissenting) (quoting *Hinson and Kersey*, in 8 *HOUSTON'S LAW OF STOPPAGE IN TRANSITS* 57).

The semantic manipulability problem is not one for which I have an easy solution. Nor do I believe that it renders all capital punishment unconstitutional.⁶⁴⁹ Instead, committed policymakers must continue to attempt drafting precise linguistic standards that capture highly aggravated murders but do not unintentionally absorb other non-aggravated, but graphically described, killings. Concrete experience in applying the linguistic aggravating factors written by Congress in the FDPA persuades me that language manipulability is a problem that should be openly recognized and discussed, rather than embarrassedly ignored. The Attorney General's Review Committee necessarily attempts to regularize the manipulation of statutory standards by its prosecutors, and thus (whether consciously or not) Main Justice becomes the articulator of specific national death penalty policies within Congress's more general language.⁶⁵⁰ Because of the manipulability problem, institutional interpreters of capital punishment statutes like the DOJ must self-consciously struggle to articulate more and more specific interpretive standards.

By way of background, as a result of the Supreme Court's decisions in *Furman* and *Gregg*, present-day capital sentencing statutes depend upon written "narrowing" standards. Prior to *Furman*, most jurisdictions provided little or no guidance to jurors about how to distinguish convicted defendants who should die from those who might instead receive imprisonment terms.⁶⁵¹ Rather, capital juries were typically told "you are entirely free to act according to your own judgment, conscience, and absolute discretion."⁶⁵² A century ago, the Supreme Court affirmed this practice with regard to the federal death penalty statutes then in place.⁶⁵³ Despite repeated challenges to standardless capital sentencing and the American Law Institute's promulgation of recommended written

649. *Accord*, *Arave v. Creech*, 507 U.S. 463, 473-74 (1993).

650. Professor Dan Kahan has made a similar point regarding federal prosecutors' concrete application of general statutory language, and he recommends that this common law interpretive role be self-consciously transferred to the DOJ, rather than allowing it to be exercised more randomly by individual federal prosecutors around the country. See Kahan, *supra* note 375, at 489-90.

651. See *McGautha*, 402 U.S. at 202-03 (stating that despite recommendation from the American Law Institute that capital sentencing discretion should be guided by written standards, "[n]one of the States have followed the Model Penal Code and adopted statutory criteria for imposition of the death penalty.").

652. *Id.* at 189-90 (quoting from the jury instructions given in *McGautha's* case).

653. See *Winston v. United States*, 172 U.S. 303, 312-13 (1899) (upholding 1897 statute which allowed jury in most capital cases to qualify their guilty verdict by adding "without capital punishment"); see *supra* notes 103-106 and accompanying text.

standards in 1959, state and federal appellate courts uniformly rejected a constitutional need for definition.⁶⁵⁴

In *Furman*, of course, the Court set out on a new path, striking down standardless capital sentencing statutes because they produced random, arbitrary, and discriminatory results. There was "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not."⁶⁵⁵ The swift reaction of thirty-five states was to reenact death penalty statutes that responded to *Furman*'s concerns.⁶⁵⁶ Those that were later upheld in the 1976 *Gregg-Proffitt-Jurek* trilogy followed the ALI recommendation (to greater or lesser extents) and provided written statutory criteria for juries to apply in determining when to sentence to death.⁶⁵⁷ Unless at least one of the written criteria were found to be present, the judge or jury was directed *not* to impose the death penalty.⁶⁵⁸ As *Gregg* summarized it, in death penalty cases "*Furman* mandates . . . that discretion must be suitably directed and limited"⁶⁵⁹

Necessarily, the mechanism for providing such direction and limitation is written criteria, which represent attempts to capture linguistically those factors and feelings⁶⁶⁰ that are thought to justify imposition of death in the first place. Since *Gregg*, the Supreme Court has steadily refined its jurisprudence of written capital criteria.⁶⁶¹ One point it has repeatedly made is that written death penalty standards must "genuinely narrow" the class of persons that

654. See *McGautha*, 402 U.S. at 196 n.8, 202-03 (collecting cases).

655. *Furman*, 408 U.S. at 313 (White J., concurring); *accord id.* at 309-310 (Stewart J., concurring) (holding that death penalty recipients are "capriciously selected" . . . [and] "systems that permit this unique penalty to be so wantonly and so freakishly imposed" are unconstitutional). Justice Stewart noted that "if any basis can be discerned for the selection of [those] few sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310 (Stewart, J., concurring) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

656. See *Gregg*, 428 U.S. at 179-80.

657. *Id.* at 194-95; *Proffitt*, 428 U.S. at 248-50; *Jurek*, 428 U.S. at 269.

658. See *Gregg*, 428 U.S. at 164-66; *Proffitt*, 428 U.S. at 248-51; *Jurek*, 428 U.S. at 269.

659. *Gregg*, 428 U.S. at 189.

660. Feelings are relevant. Whatever some Supreme Court Justices may formally maintain, capital sentencing simply is not wholly "objective." For example, the aggravating factor of "heinous, cruel or depraved" persists in the law not because it is truly objective or subject to uniform application, but because it truly captures retributive feelings thought to justify the death penalty that we as a society are unwilling to abandon.

661. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 356-58 (1998).

may receive the death penalty.⁶⁶² A valid written factor must “not apply to every defendant convicted of a murder,” but rather must apply “only to a subclass.”⁶⁶³

In addition, as the Court noted fifteen years ago in *Zant v. Stephens*, written criteria must “reasonably justify” the distinction between those consequently placed in the death eligible class and those not.⁶⁶⁴ The requirement that written criteria provide “reasonable justification” is separable from, and as important as, the “narrowing” function. It deserves elucidation. Written criteria must, in Justice White’s words, rationally help separate out those murders which are “particularly serious or for which the death penalty is peculiarly appropriate”⁶⁶⁵ We are attempting to capture in words those “particularly serious or . . . peculiar” crimes or killers who, in some rationally justifiable sense, “deserve” to die.

Of course, a written factor must clearly separate death from non-death crimes, or it is held “unconstitutionally vague.”⁶⁶⁶ This is the “narrowing” function. But the “justification” function endorsed in *Zant* is different: to “justify” imposition of death, a written factor must describe some reasonable basis for placing heightened moral opprobrium on the defendant or his crime, as well as to separate them clearly. For example, prior criminal acts, cold-bloodedness, torture, particularly evil motives, or the special status of a victim are all factors which, in some general way, can be said to make a murderer rationally seem more culpable, more “deserving” of death, than other killers.⁶⁶⁷ The same can not be said, however, for

662. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

663. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (citing *Arave*, 507 U.S. at 474).

664. *Zant*, 462 U.S. at 877.

665. *Gregg*, 428 U.S. at 222 (White, J., concurring). Justice White addressed only the category of “murders,” and imposition of the death penalty for non-killing crimes such as espionage or treason is of unsettled constitutionality. See discussion *supra* notes 229-231 and accompanying text. Justice White’s reference to other crimes “for which the death penalty is peculiarly appropriate” was likely intended to capture such non-killing crimes. *Gregg*, 428 U.S. at 222-23.

666. See *Tuilaepa*, 512 U.S. 967 (1994); accord *Arave*, 507 U.S. 463, 471 (1993); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

667. See, e.g., *Arave*, 507 U.S. at 472-73 (approving “cold-blooded” and “pitiless”); *Maynard v. Cartwright*, 486 U.S. 356, 364-65 (1988) (approving “some kind of torture or physical abuse”). See also *State v. Djerf*, 959 P.2d 1274, 1288 (Ariz. 1998) (approving victim “less than fifteen years of age,” “mutilation,” “helplessness of victim,” “senselessness of crime,” and “gratuitous violence”); *People v. Bacigalupo*, 862 P.2d 808, 814 (Cal. 1993) (approving prior conviction of a felony offense); *Cruse v. State*, 588 So.2d 983, 991 (Fla. 1991) (approving previous conviction for “violent felonies,” “present[ing] a great risk of death to many persons,” “cold, calculated, and premeditated,” and “committed to prevent lawful arrest”); *Trimble v. State*, 478 A.2d 1143, 1152-53 (Md. 1984) (approving “victim was a hostage taken or attempted to be taken

the color of the killer's shirt (e.g., green shirted killers only), use of an accent while killing (e.g., persons who speak as though from South Jersey), or model of car (e.g., drivers of Chevy Suburbans). While such factors may clearly separate one group of offenders from others, they are irrational on the "just desserts" prong of the inquiry. They are not logically connected to special culpability. They do not "justify" death.

Now understanding that written capital criteria must be both "genuinely narrowing" (not vague) and "rationally justifying" of death, my conception of the problem of language manipulability may be best described by example. While serving on the Attorney General's Capital Case Review Committee, I had to apply the written statutory criteria of the FDPA to the facts of real cases. Because the statute directs the government attorney to initially apply the statutory criteria to the case at hand and determine if s/he "believes" that the facts "justify" the death penalty,⁶⁶⁸ federal prosecutors, no less than jurors, must employ the written criteria of the death penalty statute to determine whether and how to exercise their discretion. Only if this determination is made does the statute permit the prosecutor to file a death penalty notice in the case.

In performing this statutory exercise, two of the factors that consistently gave me trouble were whether the killing had been committed for "pecuniary gain," or committed "in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim."⁶⁶⁹ Both are aggravating factors that must be considered by the jury in federal homicide cases if properly noticed and supported by evidence.⁶⁷⁰

"Pecuniary gain" is an aggravating factor well-accepted (in various variations) in the capital structures of thirty-three of the thirty-

in the course of a kidnapping or abduction or an attempt to kidnap or abduct") (quoting MD. ANN. CODE art. 27 § 413(d)(4)(1984)); *State v. Ramsey*, 864 S.W.2d 320, 327 (Mo. 1993) (approving "killing for monetary gain," "helplessness of victims," "multiple murders," and "murder of witnesses"); *State v. Compton*, 726 P.2d 837, 846 (N.M. 1986) (approving aggravating factor that the victim was a "peace officer"); *State v. Brown*, 607 P.2d 261, 262 (Utah 1980) (approving of preventing a witness from testifying, or a person from presenting evidence, or a person from participating in any legal proceedings or official investigations). Of course, some have criticized endorsement of these factors and there have been dissenting opinions in almost every case. See Kirchmeier, *supra* note 661.

668. 18 U.S.C. § 3593(a) (1994).

669. 18 U.S.C. § 3592(c)(6), (c)(8) (1994 & Supp.II 1996). Other statutory criteria caused similar difficulties; the two in the text are discussed as examples only.

670. See 18 U.S.C. § 3592(c) (1994 & Supp.II 1996). Actually the statute permits such aggravating factors to be proven by "information," a category potentially broader than "evidence" under the federal rules. See 18 U.S.C. § 3593(c) (1994).

eight states that permit capital punishment.⁶⁷¹ In the federal statute, the factor is more fully described as committing "the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value."⁶⁷² One question that immediately arises is whether "the offense" refers to the offense of *conviction* (e.g., large-scale drug dealing, car-jacking, or bank robbery) or, more narrowly, just to the killing. State judicial decisions⁶⁷³ and the "offense" language itself quickly clarify that the underlying offense, and not specifically the killing, must have been committed "in the expectation of" pecuniary gain.⁶⁷⁴ This broadens the application of the factor to some extent, and also slightly attenuates the "justification" relationship between the killing itself and "deserving" death.⁶⁷⁵

Aside from this point, problems arise in determining the proper breadth of application for the "pecuniary gain" factor. Of course, the central aim of this factor is to "get" contract killers (i.e., people who kill in cold blood for money); however, the descriptive words of the factor encompass far more than just contract killers.⁶⁷⁶ In fact, it turns out that through the use of creative rhetoric, it can plausibly be argued that very few crimes are committed without some expectation of pecuniary gain. Not only crimes involving stealing money, like bank robbery or fraud, but also crimes like drug-dealing, witness-tampering and kidnapping, are often committed with the "expectation" of financial gain, if not directly then

671. See Kirchmeier, *supra* note 661, at 410 & n.367. Notably, the factor has been court-approved in Florida, where Janet Reno was a state prosecutor for many years. See, e.g., *Henry v. State*, 328 So.2d 430, 431 (Fla. 1976).

672. 18 U.S.C. § 3592(c)(8) (Supp.II 1996).

673. One might question whether interpretation of the federal statute should be influenced at all by reference to state cases. Because the federal statute was developed with reference to state models and Supreme Court decisions regarding state death penalty statutes, we concluded at the Department that state case law is properly relevant, albeit not conclusive, in interpreting the federal statute's language.

674. This initial question may not matter in many cases, since the killing will have been done in furtherance of the underlying offense. However, particularly since the federal statute can be applied to unintentional but reckless killings, see 18 U.S.C. § 3591 (a)(2)(D) (1994), this will not always be the case. That is, in some cases the killing might *not* have been committed for pecuniary gain, even though the underlying "offense" was.

675. If death is the penalty for the killing, but the killing itself was not committed for pecuniary gain (rather, it was unintentionally reckless in the course of, say, a bank robbery), then the relationship between the bad motive (pecuniary gain), then the killing itself is less direct (although, many would argue, still direct enough to remit the death penalty).

676. See *United States v. Walker*, 910 F. Supp. 837, 848-49 (N.D.N.Y. 1995) (rejecting narrow construction of "pecuniary gain" factor).

indirectly. The factor as written is not limited to "direct" gain, nor to "money." Given this latitude, many crimes seemingly motivated by politics or even pure passion can nevertheless be *argued* also to include some expectation of indirect gain of something of value.

These problems can be seen in two hypothetical cases (vaguely modeled on cases actually confronted at the Department). First, take the case of a man who murdered his wife.⁶⁷⁷ While the crime appeared to be one of passion, a small insurance policy naming the husband as the beneficiary was also discovered. The statutory factor does not say that the "primary" motive must be pecuniary gain. Thus, an aggressive U.S. Attorney with talented writers on his or her staff can argue with force that the statutory aggravating factor is fulfilled here. Charging the case as a death case then becomes a prosecutorial judgment call, arguably permitted, but not required, by the statute.

Or consider the case of a mid-level gang member who killed a rival gang leader for "dissing" the killer's sister, where both gangs are involved in large scale narcotics distribution. While the CCE offense itself carries a lengthy imprisonment term, if a person "working in" the enterprise "kills . . . or causes the intentional killing" of another, death "may" be imposed.⁶⁷⁸ Motive is irrelevant under the CCE statute. The chain of argument is inferential, but not very long, that killing the rival leader will increase the killer's stature in his own gang and eliminate some drug-dealing competition, so that "pecuniary gain" will accrue to the killer in the future. Again, the death penalty here is arguably permitted, but certainly not mandated. While the facts do not seem to fit the implicit "theme" of the pecuniary gain factor, creative writing, forceful advocacy, and a pliant Review Committee can turn this case into a death penalty case.

Of course, reasonable people can disagree about whether the foregoing cases "should" be charged as death cases. That reasonable ground for disagreement is my point: normative judgment

677. We can posit a number of jurisdictional "hooks" for prosecuting this crime in federal court: use of a mail bomb, *see* 18 U.S.C. § 1716 (1994 & Supp.II 1996), the wife was a federal official or member of military, or the crime was committed on federal property, *see* 18 U.S.C. §§ 351, 930, 1111, 1114 (1994 & Supp.II 1996), or it was committed at an airport that handles international flights, *see* 18 U.S.C. § 37 (1994 & Supp.II 1996), or overseas, *see* 18 U.S.C. § 1119 (1994).

678. 21 U.S.C. § 848(e)(1) (1994). One can also alter the hypothetical to make the victim a local police officer who once "dissed" the gang lieutenant, and see if the change alters one's conclusion regarding filing a death penalty notice. *See* 21 U.S.C. § 848(e)(2) (1994).

calls remain to be made. Most prosecutors (indeed, most people) have immediate and strong reactions to these hypotheticals, ranging from "that's not the sort of case Congress had in mind" to "of course it's a death case." Similarly, when the Department's Committee debated the real-life versions, it too reached firm conclusions on both. The problem is not that decisions cannot be made, nor is it that the language produces ambiguities. Ambiguities are inevitable, and the Capital Case Review Committee can and does develop "common law" policies, produced by confronting such real cases, which over time lead to fairly equivalent treatment for like cases. Rather, the problem is *how*, and how self-consciously, to come up with specific interpretive standards based on such manipulable statutory factors.

Of the many cases spread across the United States, different prosecutors will reach different "common law" solutions to the ambiguities that written standards necessarily create, when they apply the written criteria to innumerable real-life fact scenarios. What I saw at the Department was that some aggressive prosecutors with talented writing skills could transform virtually any killing for which federal jurisdiction existed into a potential death penalty case. Yet other prosecutors would not even submit the same case for review, perhaps out of conscious antipathy for the death penalty, but more likely because it simply would not occur to them that the case should be considered death-eligible. Neither decision is made in bad faith, but a lack of uniformity results nonetheless. Thus, the problem of language manipulability in the federal system is, again, unequal treatment of like cases at the earliest, individual prosecutorial discretion stages.

The same problem can immediately be recognized in applying the "especially heinous, cruel, or depraved" factor, specified in the federal statute to mean that the killing "involved torture or serious physical abuse to the victim."⁶⁷⁹ Although the Supreme Court has condemned the initial, general phrase as too vague, the Court has approved it when further defined as involving "torture or serious

679. 18 U.S.C. § 3592(c)(6) (1994 & Supp.II 1996).

physical abuse.”⁶⁸⁰ Variations of this factor are accepted in the capital punishment structures of some twenty-nine states.⁶⁸¹

Note, however, that the approved phrasing effectively reduces the factor to “serious physical abuse.” “Torture,” a slightly more objective and less broad term, need not play any role in applying the factor. Many, many murders would seem to involve “serious physical abuse” of the victims. Nevertheless, the fact that an aggravating circumstance might apply to many murders does not render it unconstitutional, so long as it does not apply to all.⁶⁸² Surely some murders do not involve “serious physical abuse” before death, but rather are “instantaneous killings.”⁶⁸³ Thus, under the Court’s precedents, the federal factor of “involved . . . serious physical abuse” appears to be lawful,⁶⁸⁴ meaning that discretionary prosecutorial application is necessary.

Once again, while some intentional killings may not involve “serious physical abuse,” it is likely a small class. The phrase is plainly broad and somewhat vague. Once the talented writing skills of an

680. *Compare Maynard*, 486 U.S. at 363-64 (1988) (condemning “especially heinous, atrocious, or cruel”), and *Godfrey v. Georgia* 446 U.S. 420, 428-29 (1980) (condemning “outrageously or wantonly vile, horrible and inhuman”), *with Maynard*, 486 U.S. at 364-65 (approving a definition that would limit the factor to murders involving “some kind of torture or serious physical abuse”), and *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (approving limiting definition of inflicting “mental anguish or physical abuse before the victim’s death”).

681. See Kirchmeier, *supra* note 661, at 400 n.348.

682. This is the import of *Arave*, which approved “cold-blooded,” “pitiless slayer” as a “close” question but ultimately “narrow[ing] in a meaningful way” the category of death eligible defendants, because some killers “do exhibit feeling.” *Arave*, 507 U.S. at 475-76.

683. *But see* *Glass v. Louisiana*, 471 U.S. 1080, 1086-88 (1985) (denying cert.) (Brennan, J., dissenting) (describing the agony of electrocution).

684. Whether this should be so, as a matter of constitutional law, strikes me as fertile ground for deep debate. There surely is merit to Justice Blackmun’s dissent in *Arave*, for example, that with regard to “utter disregard for human life,” “the language’s susceptibility to a variety of interpretations . . . makes it (facially) unconstitutional.” (emphasis added) 507 U.S. at 481-82. Moreover, if “clear and objective” language for aggravating capital factors is truly required by the Constitution, then the Court’s consistent (and consistently non-unanimous) approval of such emotion-laden factors, which *taken together* do indeed seem to encompass almost every murder, seems deeply flawed. *Compare, e.g., Arave*, 507 U.S. at 475-76 (approving “cold-blooded, pitiless”), *with Arave* 507 U.S. at 476 (noting that *Walton* approved death eligibility for defendants who “take pleasure in killing”). The combination of *Arave* and *Walton* does not produce the “narrow subclass” envisioned by Justices Stevens and Ginsburg, at least. See *Tuilaepa*, 512 U.S. at 982 (Stevens, J. and Ginsburg, J. concurring). The only killers left after *Arave* and *Walton* are those few killers who are neither cold-blooded nor pleased, but rather who genuinely exhibit pity in their killings, such as a relative’s mercy-killing. This is a very small class, which is unlikely ever to be charged with, let alone sentenced to, death.

aggressive prosecutor are brought to bear on a killing, virtually any non-instantaneous death can be described as involving "serious physical abuse." See, for example, the gruesome descriptions that various judges have written of electrocution, hanging, and lethal gas executions — the chosen methods of the government for implementing death.⁶⁸⁵ Because the application of the factor turns on the ambiguity of facts and how aggressive the prosecutorial proponent is, the system is ripe for disuniformity.

The potential of this factor was brought home to the Attorney General's Review Committee in a case involving a beating death in the course of a robbery on federal land. The beating lasted only a few minutes and did not seem "especially" gruesome, — is not every single beating death gruesome? — except that the impact of one kick dislodged the victim's eyeball from the socket and it "hung" on his cheek. Unsurprisingly, this fact was repeatedly stressed in the prosecutorial documents advocating for the death penalty.

While some urban jurisdictions such as New York might take an "average" beating death in stride as a deplorable but not capital crime,⁶⁸⁶ it is not difficult to describe any beating death as involving "serious physical abuse" if one is so inclined. More rural districts that see relatively fewer federal homicides, or federal prosecutors in states that fully accept capital punishment, may be more likely to decide to pursue such a beating death case as a capital case. A

685. See *Glass*, 471 U.S. at 1086-87 (1985) (denying cert.) (Brennan, J., dissenting) (describing death by electrocution: "Witnesses routinely report that, when the switch is thrown, the condemned prisoner 'cringes,' 'leaps,' and 'fights the straps with amazing strength.' . . . 'The hands turn red, then white, and the cords of the neck stand out like steel bands . . . [T]he prisoner's eyeballs sometimes pop out The prisoner often defecates, urinates, and vomits blood and drool." (citations omitted)). See also *Fierro v. Gomez*, 865 F. Supp. 1387, 1404 (N.D.Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996), *vacated* 117 S. Ct. 285 (1996) (describing death by lethal gas: "[I]nmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of 'air hunger' is akin to the experience of a major heart attack, or to being held under water"); *Campbell v. Wood*, 18 F.3d 662, 683-84 (9th Cir. 1994) (describing the effects of death by hanging, including "occlusion of the airway," "tearing, transection, trauma, or shock to the spinal cord," and "fracture or separation of the cervical spinal column").

686. See, e.g., David Rhode, *Suspect Says Second Man Killed Teacher*, N.Y. TIMES, Oct. 20, 1998, at B1 (reporting a case in which a defendant was tried in New York for the point-blank gunshot murder of a former teacher). A "chilling" description of the crime included multiple pre-death knife wounds in the chest and neck. Surely this is "serious physical abuse," but the state prosecutor "chose not" to seek a death penalty. *Id.* See also John Sullivan, *Man Is Guilty in Three Attacks, Including a Woman's Murder*, N.Y. TIMES, Mar. 7, 1998, at B1 (no death penalty sought); John J. Royster, *No Death Penalty in Park Avenue Killing*, N.Y. TIMES, Nov. 13, 1996, at B3 (same).

painstaking, second-by-second account of the beating, reasonably supported by autopsy reports, can easily meet the "gruesomeness" level that this factor, frankly, demands.⁶⁸⁷

My point is not that this beating did not merit the death penalty, but rather that some federal prosecutors might well conclude that it did not. Those prosecutors then could, in complete good faith, not charge the case federally, or not submit it for Main Justice review, or later accept a non-death guilty plea. The "language's susceptibility to a *variety* of interpretations"⁶⁸⁸ leads to unequal prosecutorial application, before or despite Main Justice review.

C. The DOJ's Role, Revisited

The problem of indeterminacy of language when applied to facts in criminal cases is neither new nor avoidable. Writing for the Court in *McGuatha*, Justice Harlan famously suggested that to identify characteristics that call for the death penalty and then to "express these characteristics in language which can be fairly understood and applied" are "tasks which are beyond present human ability."⁶⁸⁹

Yet, while conceding the basic point in *McGautha*, Justice Brennan nevertheless dissented from the judgment upholding standardless capital discretion because "[t]he Court neglects to explain why the impossibility of perfect standards justifies making no attempt whatsoever to control lawless action."⁶⁹⁰ Justice Brennan's view on this middling ground later prevailed, of course, in *Furman*.⁶⁹¹ When the Court later approved capital sentencing statutes in *Gregg*, Justices Stewart, Powell, and Stevens agreed that written capital punishment criteria are constitutionally required, even if they are "by necessity somewhat general."⁶⁹² The Court as a whole has more recently refined (some might say conceded) this latter point: the "definition of an aggravating factor . . . is not susceptible of mathematical precision."⁶⁹³

687. See, e.g., *Arave*, 507 U.S. at 465-68 (recounting the Idaho Supreme Court's description of a beating murder, labeled, with good reason, "extremely gruesome").

688. *Arave*, 507 U.S. at 482 (Blackmun, J., dissenting).

689. *McGuatha*, 402 U.S. at 204.

690. *Id.* at 282.

691. By the time it was endorsed in *Gregg*, however, Justice Brennan dissented. See 428 U.S. at 227.

692. *Gregg*, 428 U.S. at 193-94.

693. *Walton*, 497 U.S. 655. *Accord Tuilaepa*, 512 U.S. at 980-81 (Souter, J., concurring).

Justice Brennan's argument in *McGautha* may today be redirected to the DOJ: the impossibility of perfect standards does not justify complacency with silent disuniformity. The DOJ is in a position to accept the inevitable indeterminacy of language and yet not be satisfied with it. Its unique position as a national monitor and administrator of capital punishment enables it to demand as much determinacy and consistency from prosecutors around the country as is humanly possible.

In fact, this is one role played by the Capital Case Review Committee. It applies the words of the statute to diverse cases from many different districts. It decides what potentially ambiguous statutory language should, and should not, mean. It necessarily decides what cases truly are "death eligible," often on a categorical, yet narrowing, basis (e.g., not all car-jacking killings, all federal parkland killings, or all drug gang killings, but only such killings with multiple victims, only such killings with torture, etc.). The Committee also repeatedly performs the statutory weighing exercise Congress has mandated, and it recommends to the Attorney General that a death penalty notice be filed only when it forms the belief that "death is justified."⁶⁹⁴

The repeated, fact-specific engagement of the Capital Case Review Committee with the federal death penalty statute is unique. Capital juries are one-shot actors; federal judges are likely to confront only a handful of federal capital cases over years; and members of Congress do not confront real cases as decisionmakers. But by necessity, over time and many cases, the Department's Review Committee is creating an internal "common law" of federal death penalty evaluation. Its decisions regarding the meaning of statutory language are already creating, in effect, specific national standards for the application of federal capital punishment. And because its recommendations are generally memorialized in writing, this is a body of data and precedent that can be referred to, in difficult or seemingly repetitive cases. This is particularly important as Committee membership changes — and as the occupant of the Attorney General's chair changes, as is inevitable.⁶⁹⁵ This body of precedent is not public, a confidentiality which I believe is, on balance, a public good.⁶⁹⁶ But there is no reason the Department

694. 18 U.S.C. § 3593(a) (Supp. II 1996).

695. Janet Reno is already the longest-serving full-time Attorney General in history. See *supra* note 389.

696. See Zacharias, *supra* note 475, at 1182-85 (noting benefits that flow from internal, nonpublic prosecutorial guidelines).

could not study its written death penalty memos, internally, and attempt to develop some specific, workable standards. If the venture were successful, or even useful in failure, the Department could then confront whether to publish its results. But in any case, the body of written precedents is immensely valuable: it can serve to inform all governmental actors in the national, discretionary system of capital punishment that is administered by the Department.

Problematically, however, the Department does not yet appear to be developing its policies and precedents based on a full national sample of *all* potential federal capital cases. Silent regional disparity in case acceptance and review submissions is a flaw that is potentially quite serious. As suggested above,⁶⁹⁷ now that the Department has institutionalized its Main Justice capital review process, it should expand its net to capture for oversight *all* cases that might be chargeable as federal death penalty cases. Only then can it truly claim to be pursuing uniform national policies of “consistency and fairness.”⁶⁹⁸

Moreover, because U.S. Attorneys who are now skeptical about or silently opposed to capital punishment would have to participate, such an expansion would compel an explicit, national dialogue among federal prosecutors about standards for charging and pursuing death penalty cases. Such a dialogue could be conducted candidly in confidence — it need not be public. But it necessarily would lead to development of more precise, nationally acceptable charging and plea policies and standards. At some point, the Department could publish the fruits of its talented labors, and become a leader among jurisdictions seeking to fairly administer capital punishment. State prosecutors, not to mention legislators, could learn much from such an ambitious national analysis of capital punishment standards. Not only would this improve administration of the federal death penalty, but it could add invaluable, thoughtful substance to the still ongoing capital punishment debate.

D. The Emerging “Stevens Solution”

One final point must be made about the reality of the Department’s Capital Case Review Committee. In its unavoidable development of national capital punishment standards by applying the FDPA to specific cases, the Department is, in my view, uncon-

697. See *supra* pp. 455-462; see also *supra* note 452 and accompanying text.

698. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 12, § 9-10.080.

sciously but inevitably giving effect to some version of the “aggravated cases” solution advocated by Justice Stevens in *McCleskey*. Unlike Justices Brennan and Marshall, Justice Stevens did not condemn all capital punishment in *McCleskey*. Rather, he concisely noted that the Baldus data indicates that “there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to . . . race.”⁶⁹⁹

Or, as Professor Baldus put it in the *McCleskey* evidentiary hearing, there is a category of killings so aggravated that “everybody would agree that if we’re going to have a death [penalty], these are the cases that should get it.”⁷⁰⁰ The remedy that Justice Stevens therefore offered for race disparity in capital punishment was not to abolish the death penalty completely, but rather to direct Georgia to “narrow the class of death-eligible defendants to those [highly aggravated] categories.”⁷⁰¹

My assertion, unprovable given the non-public nature of the data (and possibly not provable in any case, due to arguments about what cases are “highly aggravated”), is that by attempting to treat like cases from different districts alike, the Department’s Review Committee often screens out “low-aggravated” cases and is, for the most part, authorizing death penalty notices only in those more aggravated cases in which there is general agreement that death is appropriate. This is not the same as “everybody would agree,” and the agreed-upon level of death-appropriate aggravation within a Committee of prosecutors is likely lower than Baldus’ most culpable category.⁷⁰² Nevertheless, the Department is authorizing death in a category of cases with aggravating levels that are higher than merely the statutory minimum necessary to be “death eligible.” Although there may have been some federal death penalty prose-

699. *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting, joined by Justice Blackmun). See *BALDUS ET AL.*, *supra* note 180, at 385 (stating that “prosecutors consistently seek and juries consistently impose it without regard to the race of the victim or of the defendant”); see also *McCleskey*, 481 U.S. at 287 n.5 (majority opinion) (quoting Prof. Baldus’ stating “when the cases become tremendously aggravated . . . the race effects go away.”); *id.* at 325 & n.2 (Brennan, J., dissenting) (noting that in the first two and the last categories of aggravated culpability, “the strength or weakness of aggravating factors usually suggests that only one outcome is appropriate”). For a description of Professor Baldus’s culpability scales, see *BALDUS ET AL.*, *supra* note 180, at 92, 144-45, 154; Bhagwat & Lee, *supra* note 610, at 130-32.

700. 481 U.S. at 287 n.5 (quoting Baldus’ testimony in the district court).

701. *Id.* at 367.

702. Baldus used a scale of culpability that ranges from one to six, with one as the least culpable and six as the most. *BALDUS ET AL.*, *supra* note 180, at 144-45, 154.

cutions since 1994 that might appear to fall on the low-aggravation side of an informal line, by and large the cases authorized for pursuit of the death penalty by the Attorney General "cluster" around some conception of highly aggravated cases. Thus, case-by-case and possibly unconscious of the general effect, the DOJ is in fact implementing something like the "Stevens Solution."⁷⁰³

This result is not inconsistent with the Federal Death Penalty Act. Some might argue that Congress intended that the death penalty option be given to juries for *every* defendant that technically can be argued to meet the minimum criteria of *mens rea* and one aggravating factor. The DOJ, this argument goes, has no right under the statute to preliminarily implement a standard of eligibility higher than the statutory minimum. But while such an argument likely expresses the intent of some pro-death penalty members of Congress who voted for the FDPA (i.e., members who did not intend the DOJ to be a lenient gatekeeper for federal capital punishment, implementing even in a weak version the dissenting views in *McCleskey*), this vision of the DOJ's role is simply not consistent with the more moderate, compromise statute that was enacted with the support of some long-time capital punishment opponents.⁷⁰⁴

It must be remembered that the FDPA was passed, after two decades of Congressional deadlock, only with the support of some members who were far less sanguine about the prospect of federal executions after thirty years. The resulting legislation bridged staunch opposition to a federal death penalty that had been effective in opposing the topic for years. Thus it should be no surprise that the resulting statute directs the "attorney for the government" to play a gatekeeper's role. The prosecutor must "believe . . . that a sentence of death is justified under this chapter" before permitting the case to go forward, and in order to responsibly form such a "belief," the prosecutor must go through the process of applying the statute's evaluative standards to the case.⁷⁰⁵ This includes not only the identification of aggravating and mitigating evidence, but also a determination that aggravation outweighs mitigation, and a final decision that death is justified after all is said and done.⁷⁰⁶ Just as the jury always retains discretion under the statute to recommend no death, so too does the *statute* require the prosecutor to

703. The phrase springs from Justice Stevens' dissent in *McCleskey*.

704. See *supra* note 224.

705. 18 U.S.C. § 3593(a) (1985 & Supp. 1998).

706. See *id.* at § 3593(e) (1985 & Supp. 1998).

exercise such discretion in appropriate cases, where death is viewed as “unjustified.”

Of course, establishing a high culpability or aggravation level for murder cases that almost “everybody” can agree on is a multi-dimensional effort, extremely difficult in practice and perhaps impossible.⁷⁰⁷ But the Department so far has not consciously set out even to attempt such a project. Rather, a rough “Stevens Solution” is only an unintended side-effect of the Department’s responsible effort to apply the statute, which necessarily results in the screening-out of some lower-level culpability, albeit technically death-eligible, cases.

In addition, because a large number of the cases that the Attorney General authorizes for death are later terminated by either plea or by a jury which does not impose a death penalty, a Justice Stevens-like “extremely serious” class of cases where death is actually imposed appears to be the result of the overall federal system.⁷⁰⁸ As described above, even among the 135 federal defendants authorized for death penalty prosecution from 1990 to January 1999, only twenty (14%) have received the death penalty.⁷⁰⁹

Is the unconscious, emerging reality of the “Stevens Solution” a bad thing? Not at all. In fact, among moderate observers of capital punishment — persons not entirely pro or con, who are accepting of *Gregg* and yet concerned about the *McCleskey* arguments — there appears to be a growing convergence of views that reserving the death penalty for an “extremely aggravated” murder category provides a sensible solution to many systemic problems resulting from current capital punishment regimes. Perhaps most prominent among advocates of such a solution is Judge Alex Kozinski of the Ninth Circuit. Judge Kozinski is a Republican appointee, sometimes mentioned as a Supreme Court nominee, and certainly not a capital punishment abolitionist.⁷¹⁰ In a 1995

707. Professor Baldus does not think so. He describes one purpose of his research effort as seeking to refute the “impossibility thesis” advanced by Justice Harlan in *McGautha*. BALDUS ET AL., *supra* note 180, at 2.

708. Note, however, that this begins to bear some resemblance to the lightning-like randomness condemned in *Furman*, 408 U.S. 238 (1972), although after *Gregg*, 428 U.S. 153 (1976) and *McCleskey*, 481 U.S. 279 (1987), it appears not to be unconstitutional.

709. See chart, *supra* p.429. This number is likely to increase, however, as at least 32 more authorized capital defendants are awaiting trial and one is waiting re-sentencing. *Id.*

710. 2 ALMANAC OF THE FEDERAL JUDICIARY 18-22 (Aspen Law & Business 1999) (description of the Ninth Circuit) (appointed by Pres. Reagan); Robin Toner, *Vacancy*

article, Judge Kozinski and Sean Gallagher recommend a "political solution" (as opposed to one that is constitutionally required) for a number of ills in the capital punishment system: "differentiating only the most depraved killers" and then narrowing capital punishment statutes so that only these killers are eligible for the death penalty.⁷¹¹ Judge Kozinski acknowledges that "[t]his would not be an easy task" but argues that it yields numerous advantages: reducing the money, time, and judicial resources spent on hundreds of capital cases each year in which society does not have "the means and the will to execute"; "greater deterrent and retributive effect"; "ensur[ing] that the few who suffer the death penalty really are the worst of the very bad"; possibly removing the "latent racial biases" identified by Baldus; and returning "meaningful control" over the process to "the people, through their elected representatives . . . rather than letting the courts and chance perform the accommodation on an ad-hoc, entirely irrational, basis."⁷¹²

Thinkers about capital punishment as diverse as former Chief Justice Burger and Professor Baldus have suggested similar solutions.⁷¹³ Other scholars, both for and against capital punishment, have suggested something like the Stevens Solution as a palatable middle ground.⁷¹⁴ The task of actually designing such a system would be monumentally difficult but not, many seem to think, impossible.⁷¹⁵ To the extent that the DOJ, by simple application of

on the Court: Two Sides Prepare for Hard Battle on Court Nominee, N.Y. TIMES, July 21, 1990, at A1 ("Judge Alex Kozinski . . . is also regarded as a possible choice"); Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 2, 1997, at 48 ("Brutal facts have immense power . . . Those who commit such atrocities, I concluded, forfeit their own right to live."); *id.* at 53 ("I believe that society is entitled to take the life of those who have shown utter contempt for the lives of others.").

711. Hon. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 29-30 (1995).

712. *Id.* at 30-2.

713. See *Furman*, 408 U.S. at 375 (Burger, C.J., dissenting) (limit death penalty to "a small category of the most heinous crimes"); BALDUS ET AL., *supra* note 180, at 3 ("limit[] death sentenc[ing] to . . . the worst offenders").

714. See, e.g., WALTER BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* 179 (1991).

715. "As to impossibility, all I can say is that nothing is more true of the profession than that the most eminent among them, for 100 years, have testified with complete confidence that something is impossible which, once it is introduced, is found to be very easy of administration. The history of legal procedure is the history of rejection of reasonable and civilized standards in the administration of law by most eminent judges and leading practitioners Every effort to effect improving changes is resisted on the assumption that man's ultimate wisdom is to be found in the legal system as at the date at which you try to make a change." FELIX FRANKFURTER, *The Problem of Capital Punishment in OF LAW AND MEN* 86, 86 (Philip Elmon ed., 1st ed. 1956).

the FDPA to specific case over time, may be unconsciously implementing such a system, we should applaud its efforts and urge it to continue the enterprise, perhaps only more self-consciously.

Conclusion

As Justices Stevens and Ginsburg have recently conceded, so long as we embrace prosecutorial discretion and capital jury sentencing, the risks of disproportionate (as compared to the severity of the offense) or unfair (because influenced by impermissible factors) death penalties "can never be entirely eliminated."⁷¹⁶ They can only be "diminished," by careful monitoring of potential capital cases for instances of improper imposition.⁷¹⁷ Today, the DOJ is acting *de facto* in the role of national death penalty monitor. It is moving progressively along the path to performing this task fairly and effectively. Charged with administering a capital punishment statute that is national in scope and which requires prosecutors to believe the death penalty to be "justified" before they seek it,⁷¹⁸ the Department has implemented a centralized, high-level review process for federal cases in which U.S. Attorneys in the field wish to seek the penalty. The process at Main Justice is race-blind and self-consciously aimed at achieving consistency. The Attorney General and her staff deserve great credit for establishing the Capital Case Review Committee, providing it ample resources, and imbuing the enterprise with a sense of seriousness and moral responsibility.

Yet some serious problems remain and improvements should be considered. This Article suggests that a broader scope of review for the Committee, to include all federal cases involving killings as well as all declinations in such cases, could lead to greater national consistency, reduction of unconscious "racial empathy" in the exercise of prosecutorial discretion, and the conscious development of national "common law" standards that would uniformly raise the floor for federal capital punishment imposition. Each of these goals is within the range of discretion Congress has provided to the Department in the FDPA⁷¹⁹ and consistent with Supreme Court holdings on capital punishment. Moreover, the Review Committee has created a wealth of data in its written memoranda for the Attorney General, which the Department should now open, at least

716. *Tuilaepa*, 512 U.S. at 982 (Stevens and Ginsburg, J.J., concurring).

717. *Id.*

718. 18 U.S.C. § 3593(a) (1998).

719. See generally Kahan, *supra* note 375, at 471-88.

internally, for self-conscious study and debate. Specific national standards reflective of the views of *all* federal prosecutors should be adopted by the Department or at least studied on an experimental basis. The issues of life or death in our criminal justice system are too important for us to be satisfied with the progress the Department has already made.